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THE

LAW REPORTS.

Chancery Appeal Cases,

INCLUDING

Bankruptcy and Lunacy Cases,

BEFORE

THE LORD CHANCELLOR,

AND THE

COURT OF APPEAL IN CHANCERY.

EDITED BY GEORGE WIRGMAN HEMMING, Q.C.

VOL. X.

1874-75.—XXXVIII & XXXIX VICTORIÆ.

BIBL. LONDIN UNIV.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1875.

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NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Chancery Appeal Cases

(*Including Bankruptcy and Lunacy Cases*)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

In re AGRICULTURIST CATTLE INSURANCE COMPANY. *Ex parte* OFFICIAL MANAGER.

L. C. and L. JJ.

1874

Nov. 2.

Winding-up—Insurance Company—Costs of Realising Assets—Limited Fund of Policy-holders—7 & 8 Vict. c. 110.

An insurance company of unlimited liability, formed under the 7 & 8 Vict. c. 110, granted policies of insurance, by the terms of which the insured had no claim against the shareholders beyond the amounts unpaid on their shares. The company was ordered to be wound up, and the assets of the company, including the full amount payable on the shares, were applied in paying the policy-holders and the general creditors *pro ratâ;* and the balance due to the general creditors was paid by additional calls on the shareholders:—

Held (affirming the decision of the Master of the Rolls), that the costs of calling up the unpaid capital, as well as the general costs of the winding-up, must be borne wholly by the shareholders, and that no part was payable out of the limited fund applicable to the claims of the policy-holders.

THIS was an appeal from an order of the Master of the Rolls made in the winding-up of the *Agriculturist Cattle Insurance Company.*

The company was established as an unlimited company in the year 1845, under a deed of settlement executed by the shareholders, and was registered under the 7 & 8 Vict. c. 110.

L. C. and L. JJ.

1874

In re AGRICULTURIST CATTLE INSURANCE CO. *Ex parte* OFFICIAL MANAGER.

The policies issued by the society contained a clause limiting the liability of the shareholders to the amount of their subscribed capital. This clause varied in the policies issued at different times. The most stringent form of the proviso was that which was issued in 1858 and subsequent years, and was as follows:— "Provided always, that the funds, securities, and property of the said company remaining at the time of enforcing any claim under this agreement, unapplied and undisposed of and inapplicable to prior claims and demands, shall alone be liable to answer and make good all claims and demands upon the said company; and that no director or shareholder of the said company, his or her heirs, executors, or administrators, estate or effects, shall be in anywise liable or subject to any such claims or demands under this agreement, nor shall the said insured, his executors or administrators, enforce any judgment, decree, or order, which he, they, or any of them may obtain upon or in respect of this agreement against the personal property or effects of any director or shareholder of the said company, over and beyond the amount (if any) which he or she shall or may at the time of enforcing any such judgment, decree, or order be indebted to the said company upon or in respect of his or her share or shares in the said company; and that no person shall be liable for any claim or demand under or in respect of this agreement after he or she shall have ceased to be a shareholder of the said company."

On the 20th of April, 1861, the company was ordered to be wound up under the Winding-up Acts of 1848, 1849, and 1857, and an official manager and creditors' representative were afterwards appointed.

The allowed debts of the general creditors of the company amounted to £17,608 15*s.* 5*d.* The allowed claims for policies amounted to £16,602 5*s.* 5*d.*, making together £34,211 0*s.* 10*d.*

To meet these liabilities, calls had been made upon the shareholders far exceeding the capital for which they had subscribed. The "limited fund" applicable to the claims of the policyholders and of the general creditors, consisting of the assets of the company realised at the time of the commencement of the winding-up, and the calls on shareholders up to the amount of their subscribed capital, amounted to £17,394 1*s.* 3*d.* The "un-

limited fund," consisting of calls on shareholders beyond their subscribed capital, which was applicable to the claims of the general creditors, but not of the policy-holders, amounted to upwards of £35,000. Dividends were declared out of the "limited fund" for the payment of the general creditors and policy-holders *pro ratâ*, so far as that fund would extend, and the general creditors were paid the balance of their debts out of the unlimited fund.

The costs of the winding-up amounted altogether to upwards of £18,000, and the question arose whether a proportionate or any part of the costs ought to fall upon the "limited fund," so as to diminish the amount payable to the policy-holders, or should be borne exclusively by the "unlimited fund."

On the 11th of July, 1874, the Master of the Rolls made an order in the winding-up, that an inquiry should be made what, having regard to the dividends already declared on the claims of the policy-holders and other creditors of the company, was the amount remaining in hand of the "limited fund"; and that what, on making the inquiry, should appear to be the proportion of the "limited fund" which £16,602 5*s.* 5*d.* (the amount of the allowed claim of the policy-holders) bore to £34,211 0*s.* 10*d.* (the aggregate amount of the allowed claims of creditors against the company), should be raised out of the funds then standing to the credit of the winding-up, and paid to the policy-holders in proportion to their claims; and it was ordered that the costs of all parties of and incident to the application, and the costs not already referred to taxation of the winding-up, should be taxed and paid out of the assets of the company other than the "limited fund."

From this order the official manager appealed, and he asked that it might be varied by the Court making a declaration that the cost of realising the "limited fund" ought to be borne exclusively by that fund, and that the same fund ought to bear a proportionate share of the other costs of winding up the company in the ratio which the amount realised from the "limited fund" bore to the aggregate amount of the "limited fund" and the other assets of the company, or in some other ratio to be determined by the Court.

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Mr. *Marten*, Q.C., and Mr. *H. A. Giffard*, for the Appellant:—

We contend that the costs of calling up the subscribed capital, and a proportion of the general costs of winding up, ought to be borne by the "limited fund." The policy-holders have expressly stipulated that they shall have no claim upon the shareholders beyond the amount of the subscribed capital. If they had brought actions against the company before it was wound up, they could not have recovered their costs against the shareholders beyond their subscribed capital: *Hassell* v. *Merchant Traders' Insurance Association* (1). A winding-up is like a series of judgments, and is for the benefit of the creditors, and it is not unreasonable that each creditor should add his costs to his debt, and look to the same fund for payment of the costs as of the debt. The principle of charging costs on a particular portion of the assets is admitted by the 103rd section of the 11 & 12 Vict. c. 45, under which the company is being wound up. If the assets at the time of the winding-up consisted of stocks or other property which had to be sold, the expense of selling and getting them in would come out of those assets, and would not be borne by the general creditors; and there is no reason why the expense of getting in the unpaid capital should not be treated in the same way: *In re State Fire Insurance Company* (2).

The Master of the Rolls decided the case on the authority of *In re Professional Life Assurance Company* (3); but the point does not appear to have been much argued in that case.

Mr. *Jackson*, Q.C., and Mr. *Millar*, for the creditors' representative, were not called on.

LORD CAIRNS, L.C.:—

This is an application by the official manager of the *Agriculturist Cattle Insurance Company*, but, having regard to the nature and subject-matter of the application, it is obviously an application which ought to be treated as if made by the shareholders in that company; for it is an application for their benefit, in order that some part of the burden of costs which now lies upon them without any limit should be taken off, and should be placed upon

(1) 4 Ex. 525. (2) 34 L. J. (Ch.) 436.
(3) Law Rep. 3 Ch. 167.

a certain limited fund which represents the calls which were unpaid in the company at the time of its winding-up.

Now, the contract with the policy-holders is ascertained in the various policies, one of which has been handed up to us, and that contract provides "That the funds, securities, and property of the company remaining, at the time of enforcing any claim under this agreement, unapplied and undisposed of, and inapplicable to prior claims and demands, shall alone be liable to answer and make good all claims and demands upon the said company." I do not proceed with the rest of the sentence, because, for the purpose of my observations, this first clause is sufficient. Now I read this as being a contract with the policy-holder that the funds, securities, and property of the company remaining unapplied and undisposed of, and inapplicable to prior claims and demands at the time of enforcing the agreement, shall be liable to him, and shall alone be liable to him. It is therefore a clause which gives him a right by contract to have that fund applied in a particular way. Now the way in which, so far as this contract is concerned, the fund would fall to be applied, is thus: The time of enforcing the claim, having regard to the winding-up, is the making of the winding-up order; that, I think, was admitted at the bar. Every policy-holder, however, is entitled to ask at that moment, What is the property of the company unapplied, undisposed of, and inapplicable to prior claims and demands? The answer which would be given to such a question would be: There are, in the first instance, the assets of the company in specie. No doubt, if there are such assets, and if they are assets that require to be disposed of by sale, and costs are incurred in the sale, those costs would be deducted out of the sale moneys, and it would be the net sale moneys which would be applicable assets. But the next important item of property in this case would be the calls of the shareholders, which they ought to pay, and which have not been paid up. Now it appears to me that, both having regard to the language of this contract, and having regard to the deed of settlement which is referred to in the contract, the theory of these contracts is, that all those unpaid calls were supposed to be available at any time when they were wanted, and ought to be paid up immediately when wanted for the purpose of satisfying

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all demands upon the company. The nature of this application, therefore, is really this: The shareholders come together before the Court in a body, and say: "We admit that the calls were not paid up; we admit that steps had to be taken to procure the payment of the calls; either we or some of us"—and for this purpose I think it does not matter which—"we or some of us made difficulties in the way of payment by call, expense had to be incurred, and all the proceedings of a winding-up had to be gone through, and that expenditure having been incurred, we, the shareholders of the company, ask that it should be borne by those who had these contracts;" which, as it appears to me, gave them a right to have the whole of the assets of the company applied in their favour, as the assets stood at the time of the winding-up. Now, certainly, unless I found some authority compelling me to adopt that line of argument, I should be entirely unwilling to adopt it. I think that the essence of contracts of this kind is that the funds to which the contract points should be kept entirely for the benefit of the policy-holders, and that the costs of the winding-up, the costs of settling the list of contributories, and the costs of recovering all the calls from the shareholders who are either unwilling to pay or unable to pay, either in whole or in part, the calls due from them, are costs which ought to fall upon the company, that is to say, are costs which ought to be satisfied by further calls made upon the shareholders.

I therefore think that the decision of the Master of the Rolls in this respect was entirely correct, and that this appeal ought to be dismissed.

SIR W. M. JAMES, L.J.:—

I entirely concur. It appears to me that it is impossible to treat this as a question of two funds being got in by two classes of creditors. The policy-holders would then be entitled to say that there being a fund which they had a right to, and other debts having been contracted without reference to that liability, the costs ought not to be thrown at all upon them, that they ought to have their fund left clear for them after paying their costs, and no part of the fund ought to go in paying other debts. But, in truth, it appears to me that the costs of the winding-up have nothing to

do with the contract. The contract is that there shall be a limit so far as the debt under that contract is concerned, and that limit is to be ascertained by ascertaining the amount of the calls due from the shareholders. But the costs of winding-up are costs of settling the matters between the parties themselves; just as if it were not a case under the *Winding-up Act*, but an ordinary suit in the Court of Chancery for taking the accounts of and winding up the affairs of the partnership. In such a case the partners, as between themselves, would certainly have to pay—or the solvent partners would, if there were any insolvent partners in the firm, have to pay—all the costs of realising the estate, although for the benefit of the creditors, and although the creditors would get everything. I am of opinion that the Master of the Rolls was quite right in making this order, and that this appeal should be dismissed.

I should also add that it appears to me that we do not differ in substance from what the Vice-Chancellor *Wood* said in *In re State Fire Insurance Company* (1); because he was there evidently dealing with such costs as the Lord Chancellor has referred to, namely, those of selling an asset and realising it for the benefit of the particular fund which was in question.

SIR G. MELLISH L.J.:—

I am of the same opinion.

Solicitor for the Appellant: Mr. *J. Elliott Fox.*

Solicitors for the Respondent: Messrs. *Warry, Robins, & Burges.*

(1) 34 L. J. (Ch.) 436.

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1874

Nov. 5.

CREDLAND *v.* POTTER.

[1872 C. 263.]

Register County—Equitable Incumbrance—West Riding Registry Act (2 & 3 *Anne, c.* 4)*—Notice—Priority.*

21 Ch D 69 n. 8 Q

Held (affirming the decision of *Bacon*, V.C.), that a further charge in favour of the first mortgagee of land in the *West Riding of Yorkshire* requires registration, and in the absence of registration will be postponed to a subsequent registered mortgage taken without notice of the further charge; and that notice of the first mortgage does not impose on the subsequent incumbrancer the duty of making inquiry of the first mortgagee, and so affect him with notice of the further charge.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

On the 17th of October, 1871, the Defendants the *Darlows* mortgaged a piece of land at *Rotherham* to the Defendants *Potter & Brown* to secure £1100. This security was duly registered on the 6th of November in the *West Riding* Registry Office. The memorial merely stated the parties and the particulars of the land, without anything to shew what the nature of the deed was or what was the consideration for it.

On the 30th of October, 1871, *Potter & Brown* having advanced to the *Darlows* a further sum of £363, the *Darlows* signed and gave them a memorandum of that date, as follows:—

"Memorandum that Messrs. *Potter & Brown*, of *Rotherham*, attorneys, hold the deeds and writings relating to the building land in *Clifton Lane, Rotherham*, lately purchased of *John Heptinstall* by us for securing the sum of £363 (as per account) and costs, in addition to the sum of £1100 secured by a mortgage dated 17 Oct. 1871. And we hereby undertake at any time, at the request of the said *Potter & Brown*, to execute a further charge for better securing the said sum of £363, and interest thereon."

This memorandum was not registered.

On the 31st of January, 1872, the *Darlows* mortgaged the same property to the Plaintiff to secure £363 and further advances,

subject to the mortgage of the 17th of October, 1871, which was therein referred to as a mortgage for £1000. The Plaintiff registered this mortgage on the 12th of February, 1872, and on the 14th gave notice of it to *Potter & Brown*.

It was stated in the Plaintiff's evidence, and not contradicted by the *Darlows*, that before he took this security the *Darlows* told him that they had mortgaged the property to *Potter & Brown* for £1000, and that this was the only incumbrance on the property. The Plaintiff had searched the registry, but had not made any inquiry of *Potter & Brown* as to their claims. The Court considered it clear on the evidence that there was no ground for fixing the Plaintiff with actual notice of the further charge.

The Plaintiff having filed a bill to redeem on payment of what was due on the first mortgage only, Vice-Chancellor *Bacon* held him entitled so to do, and refused to give *Potter & Brown* any costs (1). *Potter & Brown* appealed.

Mr. *Kay*, Q.C., and Mr. *Henderson*, for the Appellants:—

There has been some conflict of decisions as to whether an equitable incumbrance requires registry at all; but it appears on the balance of authority that an equitable incumbrance not registered is postponed to a subsequent registered one: *Wright* v. *Stanfield* (2); *Moore* v. *Culverhouse* (3); *Neve* v. *Pennell* (4); *In re Wight's Mortgage Trust* (5). Those cases, however, go on this —that an equitable incumbrance is a conveyance. This may be questioned in any case where the contract is one not to be perfected by a conveyance, but only by a more formal charge; and at all events, a further charge in favour of the first mortgagee cannot be a conveyance; he has the whole estate in him already, and the only question for the Court is what equity there is to take it out of him. Now the Registry Acts do not interfere with the doctrine of tacking. A first mortgagee whose mortgage is registered may tack an unregistered further charge against an intermediate security of which he has no notice: *Wrightson* v. *Hudson* (6);

(1) Law Rep. 18 Eq. 350.
(2) 27 Beav. 8.
(3) Ibid. 639.
(4) 2 H. & M. 170.
(5) Law Rep. 16 Eq. 41, 47.
(6) 2 Eq. C. Ab. 609.

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Bedford v. *Backhouse* (1); *Cator* v. *Cooley* (2); *West Riding Registry Act* (2 & 3 Anne, c. 4). Now, it would be a most absurd state of the law that, though we could have tacked our further charge if it had been later in date than the Plaintiff's mortgage, we cannot tack it if it is earlier. We are purchasers for value, and can only be interfered with by force of a better equity, and how can a better equity be made out? There was notice sufficient to exclude the operation of the Registry Acts: *Taylor* v. *Baker* (3); *Ford* v. *White* (4); *Le Neve* v. *Le Neve* (5); *Wormald* v. *Maitland* (6). Here, we contend, on the evidence, that there was actual notice; but if not, it is clear that the Plaintiff, who took a mortgage for a pre-existing debt, designedly abstained from inquiry. He saw the memorial of our first mortgage, which did not state that the instrument was a mortgage, nor what was the consideration; he took the mortgagor's word for its being a mortgage and for the amount due, and made no inquiry of us. He, therefore, ought to be treated as having had notice, and to be postponed.

Mr. *Bagshawe*, Q.C., and Mr. *B. B. Rogers*, for the Plaintiff:—

The argument on the other side comes to this—that because there is a case within the mischief of the Act, but not within its terms, and in which therefore the Act gives no remedy, the remedy is not to be given in a somewhat similar case which is within the terms. If this is a "conveyance" the case is within the terms of the Act. Now "conveyance" is not a technical term; it means an instrument which passes an interest in land to another person. That an equitable charge in favour of a third person is a conveyance is established by the authorities referred to on the other side, and is admitted by the Appellants. The only case that appears to make for them, *Sumpter* v. *Cooper* (7), went on the ground that there was no instrument in writing, and, therefore, nothing that could be registered. What difference can it make that the charge is given in favour of a person who has a mortgage already? In equity he has only got a limited interest in the land,

(1) 2 Eq. C. Ab. 615.
(2) 1 Cox, 182.
(3) 5 Price, 306.
(4) 16 Beav. 120.
(5) Amb. 436, 442.
(6) 35 L. J. (Ch.) 69.
(7) 2 B. & Ad. 223.

and the further charge conveys to him a further interest. The test is, Can the Appellants succeed in their claim without the help of the memorandum of the 30th of October, 1871? If they cannot, they must rely on that memorandum as conveying an interest to them, and for want of registry it is fraudulent and void as against me. It is not merely to be postponed to my security, but it cannot be used as against it, and, therefore, tacking cannot be allowed.

Mr. *Bush*, for the mortgagor.

Mr. *Henderson*, in reply.

LORD CAIRNS, L.C.:—

It will be convenient, in the first place, to advert to the question whether the Plaintiff had or had not, at the time when he took his mortgage, notice not merely of the first mortgage, but also of the further charge. In my opinion, it is not in any way made out that he had such notice. [His Lordship here examined the evidence on the point whether a statement that *Potter & Brown* claimed more than £1500 as due to them on mortgage, had been made to the Plaintiff before he took his security, and came to the conclusion that it had not been made till after the security was taken.] I therefore conclude that there was no direct notice of the charge. It was suggested then that the Plaintiff ought to have made inquiry of the Appellants, and not having made any, must be fixed with notice of what he would have learnt if he had made inquiry. I am not aware of any authority to the effect that a person finding a mortgage on the register is bound to inquire of the mortgagee what is due upon it. He takes his chance, and whatever is due on it he must bear. It is not denied that the mortgagors told the Plaintiff that £1000 was the sum due on the mortgage, and I cannot come to the conclusion that the Plaintiff had notice of the charge, or was guilty of any negligence which ought to postpone his security to it.

The question then is, whether the further charge of *Potter & Brown* was a "deed or conveyance" within the meaning of the *West Riding Registry Act*. The wording of the Act is not very

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clear, but we cannot read the first section without seeing that the documents intended to be registered were all deeds and conveyances of or affecting lands within the *West Riding*. Is, then, an instrument not under seal, giving a charge on the equity of redemption in an estate, a "conveyance" within the meaning of the Act? There is no magical meaning in the word "conveyance;" it denotes an instrument which carries from one person to another an interest in land. Now, an instrument giving to a person a charge upon land gives him an interest in the land—if he has a mortgage already it gives him a further interest; and so, whether made in favour of a person who has already a charge, or of another person, it is a conveyance of an interest in the land. I come the more readily to this conclusion, because at the time when the Act was passed interests in land were frequently, though not so frequently as now, given by mere charges; and the case therefore comes within the mischief intended to be guarded against by the Act. This memorandum was, then, in my opinion, a conveyance affecting land within the meaning of the Act.

That being so, is this an instrument which required registration to make it valid as against a subsequent registered instrument? The preamble of the Act states that most of the traders in the *West Riding* are freeholders, and have frequent occasion to borrow money on their estates for managing their trade, but, for want of a register, find it difficult to give security to the satisfaction of the money-lenders, though the security they offer is really good, and that by reason of this the trade is much obstructed. It is, therefore, the object of the Act that there should be on the register a memorial of every incumbrance. But if the argument of the Appellants were to prevail, a mortgage might be given to a man on one day for £1000 and on the next day a further mortgage for £100,000, which might be kept off the register and yet set up against any subsequent incumbrancer. In my opinion, this is not consistent with the words of the statute, "every deed or conveyance that shall at any time after any memorial is so registered be made and executed of the houses, manors, &c., or any part thereof, comprised or contained in any such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof

shall be registered, as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

We have here a subsequent mortgagee whose mortgage is duly registered, a first mortgage which is valid against him, and a further charge prior in date to his security, but not registered; this further charge is by the statute declared fraudulent and void as against him. It was ably argued by Mr. *Henderson* that the words of the statute only mean that an unregistered mortgage is to be postponed to a subsequent registered one, and that the Appellants must be in as good a position as if their further charge had been subsequent to the date of the Plaintiff's mortgage. But a person advancing money on a mortgage subsequent to the registered mortgage may say, "I rely on the words of the statute, which says that all unregistered conveyances prior to my security are fraudulent and void as against me; I am therefore safe as to the past. I know that the mortgagee may advance further sums, which, if he has no notice of my security, can be tacked, but I can guard myself against this danger by giving him notice." Accordingly, here the Plaintiff gave notice to the first mortgagees. It would frustrate the object and violate the express enactments of the Act if, after the Plaintiff had thus protected himself by search and notice, the further charge were to be let in by adopting a construction of the Act nullifying the words "fraudulent and void," and making them merely denote postponement. I am of opinion, therefore, that the further charge cannot prevail against the Plaintiff.

As regards the costs, I should be slow to infringe on the rule that a mortgagee is entitled to the costs of a redemption suit; but the present is like a case where a mortgagee denies the mortgagor's right to redeem. *Potter & Brown* refused to allow redemption, except on payment of what was due on both their securities, and I think that they have had from the Vice-Chancellor as much indulgence as they were entitled to in the matter of costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. During the first part of the argument I felt considerable doubt whether a mere agreement varying

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the terms of the proviso for redemption in a mortgage could be held to be a "conveyance" within the meaning of the Act. But I am now satisfied that this doubt arose from a fallacious way of putting the case. The question is, whether the document in question gives the Appellants any right or interest in the land? If not, it is useless for the purposes of this suit, and they can make out their case without it; if it does, it is void against the Plaintiff for want of registration, and cannot be used to establish any right against him. I agree with the Lord Chancellor as to the absence of evidence of notice and as to the costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and will only add that there are subsequent clauses in the Act which, to my mind, shew clearly that it was not intended to be confined to conveyances in the most usual sense of that word. Thus, the 8th section provides that the memorial is to contain the particulars of the lands "given, granted, conveyed, devised, or any way affected or charged." Then the 18th section provides for the mode of entering a memorial of any deeds, conveyances, and wills executed at a distance which "do or may concern or affect" lands in the *West Riding*. It seems clear that these words must have been intended to apply to a mere equitable charge. The memorandum, then, in the present case, was an instrument requiring registration, and as the absence of registration makes it, by the express terms of the Act, fraudulent and void as against the Plaintiff, it cannot be tacked against him.

Solicitors: Messrs. *Edwards, Layton, & Jaques;* Mr. *Redhead;* Messrs. *Emmet & Son.*

KEMPSON *v.* ASHBEE.

L. C. and L. JJ.
1874
Nov. 6.

[1873 K. 14.]

Undue Influence—Lady just of Age—Subsequent Confirmation—Setting aside Security—Laches.

A young lady, who was living with her mother and step-father in 1859, shortly after she came of age, at the solicitation of her step-father, executed a bond as surety to secure the repayment of a sum of money advanced by the Defendant payable at the end of six years. In 1866 the Defendant brought an action and recovered judgment against the Plaintiff's step-father on the bond, and, to avoid an execution, the Plaintiff, who was then twenty-nine years of age, but who still resided principally with her step-father, was induced by him to execute a second bond as surety to secure the amount of the judgment and costs. Both bonds were prepared by the step-father's solicitor, and the Plaintiff had no independent advice. In 1872 the Defendant brought an action against the Plaintiff on the bonds, and she then filed her bill to set them aside:—

Held (affirming the decision of *Bacon*, V.C.), that the second bond must be taken as connected with the first, and that, as there was no proof that the Plaintiff was aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first; and both bonds were set aside against her:

Held, also, that she was not barred by laches, notwithstanding the time which had elapsed before she asserted her right to relief.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

The bill was filed to set aside two bonds given by the Plaintiff, in 1859 and 1866, as a security for the debt of her step-father, on the ground of pressure and undue influence exercised by her step-father, in whose house she was at the time living, and the absence of independent professional advice and assistance in the matter.

The Plaintiff, Miss *Kempson*, was born in 1837, and was entitled under the will of her father, who died in December, 1849, to a life interest in certain property realising an income of about £195. In 1851 her mother was married to *Charles Sladden*, and on leaving school in 1854, the Plaintiff, then about seventeen years old, went to live with her mother and step-father. In 1857, *Sladden* being in difficulties, applied to the Defendant *Ashbee* (a farmer near *Herne Bay*), who held his note of hand for £100, for a further advance. The Defendant declined, unless he got additional secu-

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rity; but on being subsequently informed by *Sladden* that the Plaintiff was possessed of property in her own right, and was willing to become surety for him, he agreed to lend *Sladden* £350 upon having the repayment of that sum and the debt of £100 secured by the joint and several promissory note of *Sladden* and the Plaintiff. At this time an execution was in the house. *Sladden* applied to the Plaintiff (then aged twenty) to become a security for him, but, having promised her uncle when she left school that she would not sign any paper, she for some time refused. At length, however, she consented, on account, as she stated, of *Sladden's* ungovernable temper, and the many violent scenes (occasioned by her refusal) which she had to go through. She was then taken by *Sladden* to the office, in *Canterbury*, of Mr. *De Lasaux*, solicitor of the Defendant, and there signed a promissory note by which she and *Sladden* jointly and severally promised to pay the Defendant £450 with interest. The Plaintiff had no professional adviser in the matter, but *De Lasaux* stated in his evidence that he at the time explained to her the nature of the instrument, and that he was not aware that she was under age, there being nothing in her appearance to make him suspect it.

In 1859, very soon after the Plaintiff had attained her majority, the Defendant pressed *Sladden* for payment, and *Sladden* again applied to the Plaintiff for her signature. The Plaintiff at first refused, but under considerable pressure, as on the former occasion, being, as she stated, made to sign, and relying upon his assurance that her signature would be only a matter of form, and that she would never be called upon for anything under the instrument, she consented. Accordingly, on the 13th of September, 1859, she went with *Sladden* to the *Pavilion Hotel, Folkestone*, where they met *De Lasaux*, who produced a bond for securing payment to the Defendant on the 1st of September, 1865, of £600 and interest, alleged to be due for principal, interest, and costs in respect of the previous loan. The Plaintiff signed the bond without reading it, and *De Lasaux* stated that although he did not read over the bond to her, he informed the Plaintiff—as he always did on such occasions—of the nature and amount of the liability she was incurring. This was denied by the Plaintiff.

Part of a letter from the Plaintiff to *Sladden*, which had been given by him to the Defendant, was produced in evidence. The letter was not dated, but the Court was of opinion that it bore internal evidence of having been written between the making of the promissory note and the execution of the bond. This letter contained the following passage:—"I have an objection to signing another paper. I am quite aware that one is not legally binding, but it is so morally. I should not consider myself more bound by another than I do by that. Mr. *Ashbee* was contented at the time, and he must remain so now. I am sure you know me well enough to feel sure, dear *Charles*, that if you require my assistance, I shall always render you all that lies in my power. Uncle told me never to put my name to any paper when I was of age, and I cannot do it; if you are vexed with me you will quite understand my motive." The Plaintiff's uncle, Mr. *G. S. Kempson*, referred to in the above-mentioned letter, was one of the executors of her father, and one of her guardians.

In 1866 *Sladden* was again in difficulties. The Defendant had recovered judgment against him upon the former bond, but agreed not to issue execution if he would get the Plaintiff to join in another bond for the whole amount due upon the judgment. The Plaintiff was again applied to, and, under the same pressure as before, she, on the 9th of March, 1866, signed, in the presence of *De Lasaux* and *Sladden*, a bond for £705 and interest. The same contradictory statements were made in the evidence as to any explanation having been given to her by *De Lasaux*.

In September, 1866, the Defendant issued a writ against *Sladden* and the Plaintiff on the bond of March, 1866, but the Defendant did not serve the Plaintiff with the writ, being unable to discover her residence, and the action was not proceeded with.

The Plaintiff stated in her affidavit that the abode of her mother and *Sladden* had always been her home, but she had always spent a considerable portion of each year in visits to her relatives and friends; that she had always been on affectionate terms with her uncle, Mr. *G. S. Kempson*, and had always spent some weeks in each year as a casual visitor with him, but she never resided with him; and that she never informed him of her having become surety for *Sladden*.

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In the year 1869 Mr. *G. S. Kempson* was first informed of what had taken place, and he offered to compound the matter for £300, but the Defendant refused, and, in 1872, took proceedings in bankruptcy against the Plaintiff, and also commenced an action at law against her for the amount due under the bond of 1866. Under these circumstances, the bill was filed against *Ashbee* to set aside, as improperly obtained from the Plaintiff, and fraudulent and void as against her, the bonds of September, 1859, and March, 1866, and to restrain proceedings by the Defendant for recovering the amount secured by them.

The Vice-Chancellor declared both the bonds fraudulent against the Plaintiff, and granted an injunction restraining the Defendant from any further prosecution of the action. From this decision the Defendant appealed.

Mr. *Eddis*, Q.C., and Mr. *Speed*, for the Appellant:—

The Court will not allow a jurisdiction which is intended as a protection against fraud to be made the means of committing a fraud upon an innocent creditor. The Plaintiff, in 1866, when she must be assumed to have become fully emancipated from *Sladden's* influence, being of the mature age of twenty-nine, deliberately confirmed the transaction of 1859, and acknowledged herself to be bound thereby; and, even assuming that the original transaction could have been successfully impeached if it had stood alone, it is impossible now to set it aside: *Wright* v. *Vanderplank* (1). The fact that the Plaintiff did not know that the first bond was not binding on her is no objection to the validity of the confirmation: *Earl of Chesterfield* v. *Janssen* (2). There was good consideration for the execution of the second bond. The consent of the Defendant to forbear to enforce judgment upon the first bond was sufficient consideration. But we maintain that, independently of the confirmation, there was no ground for setting aside the first bond. The solicitor who proposed it swears that he carefully explained to her the effect of what she was about to do, the nature of the document, and the liability she would thereby incur; and the letter that has been produced negatives conclusively her allegation that she was terrified into executing it by the threats of

(1) 8 D. M. & G. 133. (2) 2 Ves. Sen. 125.

Sladden. The mere fact that shortly after she came of age she voluntarily relieved her step-father by becoming security for his debt, is not of itself a ground for imputing undue influence to the step-father; or, even if such influence had been exercised, for imputing knowledge of it to the creditor who in this manner obtained payment of his debt.

The cases cited on behalf of the Plaintiff are inapplicable, being all of them cases in which the securities were executed before or shortly after the person seeking to set them aside came of age: *Thornber* v. *Sheard* (1); *Archer* v. *Hudson* (2); *Maitland* v. *Backhouse* (3); *Maitland* v. *Irving* (4); *Baker* v. *Bradley* (5); *Bury* v. *Oppenheim* (6).

We also rely on the laches of the Plaintiff in applying to the Court to relieve her from the bond: *Turner* v. *Collins* (7).

Mr. *Kay*, Q.C., and Mr. *Phear*, for the Plaintiff, were not called on.

LORD CAIRNS, L.C., after referring to the facts of the case, continued:—

The transaction was, therefore, this: A young lady scarcely over twenty-one years of age joins her step-father as security for the repayment of money, not having received any of the money or any other consideration herself, and the security not to come to maturity for six years. There is a marked distinction between this case and another where a person on attaining twenty-one gives an immediate benefit to his parent, with full knowledge of the value of money, and knowledge that the security may be enforced immediately. This security was not to come into operation for six years, and only by way of suretyship, if her step-father himself failed to pay. If there ever was a transaction which required independent advice this was one. How could this young lady understand the nature of the transaction? How could she know whether, at the end of six years, her step-father was likely

(1) 12 Beav. 589.
(2) 7 Ibid. 551.
(3) 16 Sim. 58.
(4) 15 Sim. 437.
(5) 7 D. M. & G. 597.
(6) 26 Beav. 594.
(7) Law Rep. 7 Ch. 329.

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to be solvent or insolvent? Of course he told her he would pay, but it was a case, above all others, in which independent advice was necessary. But this is not all. Her income only amounted to £195, and that was all she had to live on, and if the bond was enforced against her the creditors might sweep away her whole income for two or three years. Is it possible that this Court will permit such a security to be enforced? I am clearly of opinion that it would not, according to all the authorities. I entertain no doubt that if the Plaintiff had filed a bill within a reasonable time it would be a matter of course that the security should be set aside.

Now I proceed from 1859 to 1866. The six years pass on, and during that time the Plaintiff heard nothing of the bond. If there had been no transaction previous to 1866, if no promissory note had been given in 1857, and no bond in 1859, I express no opinion what the Court would have said to a bond given as security for her step-father in 1866. It may well be that such a bond would have been good; it may well be that the only question would have been whether, in 1866, she was really under undue influence, and that it might have been held that she was not.

But that is not the present case. What were her motives for giving the bond of 1866? Was it kindness, benevolence, affection for her step-father? It was nothing of the kind. The Defendant says in his answer and his cross-examination that *Sladden* came to him and intreated him not to press him on the bond of 1859, but that he refused to give time and take another bond unless he had Miss *Kempson's* security; and he then put it into the hands of *De Lasaux*, who prepared the new bond. The debt had then risen to £705 by costs and interest. The bond was given, as the Plaintiff's evidence shews, under clear pressure. Here was a creditor saying he would insist on his rights against her and her step-father unless there was a new bond for the sum already due, with arrears of interest, and she was ignorant of the fact that she had only to apply to this Court to get the previous bond declared mere waste paper. Is it possible that this can be held to be a confirmation of the first bond? To constitute a confirmation there must be knowledge of the invalidity of the document. But here there was no knowledge of the invalidity. This bond was in-

separably connected with the bond of 1859, and that with the promissory note, and therefore those who are interested under the bond of 1866 are unable to hold it.

It only remains to refer to what took place after 1866. I agree that there are cases in which laches in asserting a person's rights must be taken as a bar. But it must be remembered what the nature of this case is. So long as there was no claim asserted, the Plaintiff might well be content to let matters remain as they were. She might expect that the creditor would enforce the debt against her step-father. There was, indeed, a threat of proceedings against her; but no real measures were taken till 1872, when the action was brought, and that immediately led to this bill. I think, therefore, the Plaintiff is not barred by delay, and that the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. The principle is very simple. This Court has endeavoured to prevent persons subject to influence from being induced to enter into transactions without independent advice. The first question, therefore, is, whether the bond of 1859 was obtained by the undue exercise of influence of the step-father, and was it obtained under such exercise as that the knowledge of it can be imputed to the Defendant? The letter of the Plaintiff to her step-father renders it impossible to answer otherwise than in the affirmative. That being so, if we are to hold that what took place in 1866 cured the invalidity of the transaction of 1859, it would only be pointing out a way in which persons might, by legal trickery, evade the effect of the rules of this Court. I agree that the bond of 1866 must be declared wholly void against the Plaintiff.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Wilkins, Blyth, & Marsland;* Messrs. *Ashley & Tee.*

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[1870 H. 248.]

Mortgage—Fraud—Legal Estate—Purchaser for Valuable Consideration—Trustees—Receipt—Recital—Estoppel—Evidence—Admission.

Two trustees, one of whom was a solicitor, advanced money on mortgage. The mortgagor, with the concurrence of the solicitor trustee, sold part of the mortgaged property without disclosing the mortgage. Regular conveyances in fee to the purchasers were executed by the mortgagor, containing a recital that he was seised or otherwise well and sufficiently entitled in fee simple. The solicitor trustee received the purchase-money, and retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation of the solicitor trustee, that the property was then about to be sold by the mortgagor. Soon afterwards the solicitor trustee absconded, and the other trustee then filed a bill against the mortgagor and the purchasers, praying for foreclosure against them :—

Held, that though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the reconveyance, which, having been obtained by fraud, must be cancelled; and that they had purchased only the equity of redemption :

Held, that under the form of conveyance adopted, neither the Plaintiff nor the mortgagor was estopped from denying that the legal estate had passed by the conveyance to the purchasers :

Held, that a decree must be made against the purchasers, but for foreclosure and not for sale; and that the purchasers would not be ordered to deliver up the deeds which were in their possession.

A mortgage deed could not be produced, and a copy purporting to have been furnished by the solicitor who held the deed was produced on behalf of the Plaintiff as evidence of the deed; the Plaintiff also deposed to the existence of the mortgage. The Defendants had in their answers not expressly challenged the mortgage deed, and had admitted that there had been a reconveyance of part of the property comprised in the mortgage :—

Held, that as against these Defendants the mortgage deed was sufficiently proved.

Decree of *Bacon*, V.C., affirmed with variations.

IN March, 1856, the Rev. *Charles Harbord Heath* and *William Swain Crealock*, a solicitor, were appointed the trustees of certain funds, out of which they advanced £7700 to *Thomas King Stephens* upon the security of a mortgage dated the 24th of November, 1856, on property in *Wales*, of which *Stephens* was the owner in fee.

Early in 1859, *Stephens*, intending, as he stated, to pay off the mortgage debt, advertised the mortgaged hereditaments, with other property belonging to him, for sale. This intended sale was abortive; but *Stephens* subsequently (in February, 1859,) agreed to sell by private contract to the Defendants *Lewis*, *Beavan*, and *Pugh*, for sums amounting in the aggregate to £3080, three several portions of the land comprised in the mortgage.

Crealock, who acted as solicitor for *Stephens* in the matter, represented to him that as the Plaintiff was somewhere abroad great delay would be occasioned by getting him to join in the conveyances to the purchasers, or in a reconveyance to *Stephens*. Accordingly *Stephens*, as he stated, wishing to avoid any delay, agreed with *Crealock* that the sales should be made without disclosing the existence of the mortgage, and that he would not require a reconveyance from the Plaintiff and *Crealock* until the whole of the mortgage debt was paid off. The abstracts delivered accordingly did not disclose the mortgage. The purchasers examined the deeds abstracted, and made the usual searches and inquiries as to incumbrances. The titles were approved of, and regular conveyances to the purchasers were prepared, one of them containing this recital, and the two others containing similar recitals:—

"Whereas the said *Thomas King Stephens* is seised or otherwise well and sufficiently entitled for an estate of inheritance in fee simple in possession, free from all incumbrances except as hereinafter mentioned of or to the messuage or tenement, lands and hereditaments hereinafter particularly described or referred to and intended to be hereby conveyed with their appurtenances: And whereas the said *Thomas King Stephens* hath contracted with the said *James Beavan* for the absolute sale to him of the said messuage or tenements, lands and hereditaments hereinafter particularly described or referred to and intended to be hereby conveyed with their appurtenances and the inheritance thereof in fee simple in possession."

The conveyances were by grant in the usual form, the only parties to them being *Stephens* (his wife joining in one case to release her dower) and the respective purchasers; and they con-

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tained the usual covenants for title and for further assurance. The only incumbrances mentioned were leases. The properties were separate, and the title-deeds were delivered to the respective purchasers by *Stephens*, he having received them from *Crealock*, who had them in his possession as solicitor to himself and his co-trustee, the mortgagees.

The purchase-moneys, amounting to £3080, were received by *Crealock*, who gave *Stephens* a receipt for that sum signed by himself on behalf of himself and his co-trustee *Heath*, and an undertaking that they would reconvey.

Stephens had also been a solicitor, and there had been many pecuniary dealings between *Stephens* and *Crealock*; and *Stephens*, after the sale, paid *Crealock* interest on the balance only, believing for some years that the money paid had been properly invested by *Crealock*. *Crealock*, however, had himself retained the £3080, but continued to pay to the *cestuis que trust* interest on the whole £7700.

In December, 1869, *Stephens* agreed to sell to one *Price*, for £1500, another portion of the property, and on this occasion the whole title, including the mortgage, was disclosed to the purchaser; and it appeared that *Stephens* had by this time discovered that the £3080 had been retained by *Crealock*.

Crealock then represented to his co-trustee *Heath* that *Stephens* had succeeded in selling a part of the mortgaged property for £3080 and another part for £1500, and was desirous of having reconveyed to himself the several portions so sold upon payment of the several sums in part discharge of the mortgage debt. Two deeds were accordingly prepared for the purpose of effecting this object, and were sent by the Plaintiff's then solicitors, Messrs. *Budd & Son*, to the Plaintiff for execution by him, one being a conveyance, by the direction of *Stephens*, to *Price* of the part sold to him for £1500; the other purporting to be a reconveyance of the lands previously sold to *Stephens*, in consideration of £3080, then paid by him; the alleged object being to enable him to convey them separately to a purchaser or purchasers. The Plaintiff executed these deeds, and signed the usual indorsed receipts, and sent them to *Crealock* on or before the 22nd of August, 1870. *Crealock* also executed the deeds. *Price's* deed was de-

livered to him on the completion of his purchase, he paying the £1500 to *Crealock*, who retained that sum also.

In September, 1870, *Crealock* absconded, carrying with him the mortgage deed of 1856.

Mr. *Heath* thereupon filed the bill in this suit against *Crealock*, *Stephens*, *Lewis*, *Beavan*, *Pugh*, and *Price*, charging that his signature to the reconveyance was obtained by fraud, and that *Crealock* had no authority to receive the £3080 or the £1500, and praying that the deed of reconveyance to *Stephens* might be ordered to be given up to be cancelled, and that in the meantime *Stephens* might be restrained from handing it over to the purchasers; that *Stephens* might be declared liable to pay the £3080 and £1500; and that it might be declared that the £3080 and the £1500 were still charged upon the property comprised in the mortgage of 1856; and that the property alleged to have been conveyed to *Price* was still subject to the mortgage; that the usual accounts should be taken, and that in default of payment the Defendants (except *Crealock*) might be foreclosed; and that upon foreclosure *Lewis*, *Beavan*, *Pugh*, and *Price* might be ordered to deliver up the deeds in their possession.

The case made against *Stephens* and his defence depended upon the dealings between him and *Crealock*. *Stephens* also relied on the receipts given by *Crealock* in 1859 and the receipts on the deeds of 1870. *Lewis*, *Beavan*, and *Pugh*, by their answers, alleged that they were purchasers for valuable consideration, and that by the reconveyance of 1870 the properties conveyed to them respectively were reconveyed to *Stephens* by the Plaintiff and by *Crealock*, discharged from the mortgage of 1856; that the deed of reconveyance was still in the possession of *Stephens*, and the Defendants claimed every aid to their titles resulting therefrom; that the Plaintiff was by his own act and deed estopped from denying that he had received the whole purchase-money; and that *Stephens* was a bare trustee of the legal estate for the purchasers respectively. *Price* alleged that he was a purchaser for valuable consideration, and had obtained the legal estate and a proper receipt.

The mortgage deed of 1856 was still in the possession of *Crealock*, and the Plantiff produced as evidence of it a copy purport-

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ing to have been furnished by *Crealock* to *Stephens*. He had also in his evidence deposed to the fact of the mortgage.

The Vice-Chancellor *Bacon* dismissed the bill with costs as against *Price;* declared that *Stephens* was liable; that the deed of reconveyance must be cancelled, and that the Plaintiff was entitled to such rights as if it had not been executed; that an account of what was due for principal, interest, and costs, should be taken, and *Stephens* ordered to pay, and in default, and if the purchasers (except *Price*) failed to pay, the Plaintiff should be entitled to realise his security; that the property (except that conveyed to *Price*) should be sold, and the Defendants ordered to deliver up to the purchasers the deeds in their possession respectively; as reported (1).

Stephens, *Lewis*, *Beavan*, and *Pugh* appealed.

A preliminary objection was taken on behalf of one of the purchasers that the mortgage deed was not sufficiently proved.

LORD CAIRNS, L.C.:—We are of opinion, upon this preliminary objection, that there is sufficient evidence of the mortgage. It is mentioned and distinctly pleaded in the bill, and the Plaintiff has repeated the statement in his affidavit. It is obvious, however, that the evidence of the Plaintiff would not alone be sufficient proof, but we have here to look not merely at the evidence given by the Plaintiff, but also at the answer of the Defendants, and what we find in that answer is, that at a particular date there was a reconveyance, as it is there called, executed by those who were alleged to be the mortgagees of the property in question. I observe, also, that though the answer speaks of the mortgage, it does not deny the execution of the mortgage deed, or expressly challenge the Plaintiff to prove it. Where a Defendant claims the benefit of a reconveyance of mortgaged property he cannot be allowed to deny that there was any mortgage at all.

Mr. *W. Barber*, for *Stephens*.

Mr. *Eddis*, Q.C., and Mr. *W. Pearson*, Q.C., for *Pugh*:—

We are purchasers for valuable consideration without notice,

(1) Law Rep. 18 Eq. 215.

and we took on the occasion of the purchase every possible precaution. That is a good plea, whether we have the legal estate or only the equitable estate: *Joyce* v. *De Moleyns* (1); *Attorney-General* v. *Wilkins* (2). Moreover, the legal estate, if it has not passed to us, is now in our trustee, and our title is complete. *Stephens* purported to convey the legal estate, and he is now estopped from denying it. If by accident, or by any means, he has got the legal estate, it has passed to him for us, and we have the benefit. *Eyre* v. *Burmester* (3) does not govern a case like this. We cannot be implicated in any fraud: *Pilcher* v. *Rawlins* (4).

As to the delivery of the deeds, which is ordered by the decree, there is no pretence for taking anything from us: *Kendall* v. *Hulls* (5); *Frazer* v. *Jones* (6). The decree ought to have been for foreclosure merely, and then there is no delivery of deeds. *Colyer* v. *Finch* (7) is no authority for such a thing. *Hunt* v. *Elmes* (8) does not affect the case. The Court is not here administering the trusts of this money, as in *Newton* v. *Newton* (9). In *Thorpe* v. *Holdsworth* (10) the Vice-Chancellor refused to order more than the production of the deeds.

Mr. *Swanston*, Q.C., and Mr. *Crossley*, for *Beavan* and for *Lewis*:—

Whether *Crealock* may or may not have defrauded *Stephens*, or both may have defrauded the Plaintiff or the *cestuis que trust*, are things with which we have nothing to do. We have nothing to do with the trust, and we can only regard *Heath* and *Crealock* as the legal owners of the mortgage money. We are purchasers for valuable consideration without notice of any fraud or defect, and as such we can protect ourselves by obtaining by any possible means the legal estate, even after we have notice of the fraud, and even if it has been obtained by fraud: *Sir John Fagg's Case* (11); *Harcourt* v. *Knowel* (12); *Sanders* v. *Deligne and Barns* (13);

(1) 2 J. & Lat. 374.
(2) 17 Beav. 285.
(3) 10 H. L. C. 90.
(4) Law Rep. 7 Ch. 259.
(5) 11 Jur. 864.
(6) 17 L. J. (Ch.) 353.
(7) 5 H. L. C. 905.
(8) 28 Beav. 631; 2 D. F. & J. 578.
(9) Law Rep. 6 Eq. 135; Ibid. 4 Ch. 143.
(10) Ibid. 7 Eq. 139.
(11) Cited 1 Vern. 62; 1 Ch. Ca. 68.
(12) Cited 2 Vern. 159.
(13) Freem. 126.

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Siddon v. *Charnells* (1), all mentioned in *Basset* v. *Nosworthy* (2). We have paid our money for a legal estate, and we have a right to it if we can get it: *Hunter* v. *Walters* (3). *Stephens* is as much a trustee for us as for the Plaintiff: the only difference is that he did in 1870 what he ought to have done in 1859; but our equity cannot be affected by the time which has elapsed. The deed of reconveyance amounts to an express recognition of our title, and why are we to be deprived of the benefit? The Plaintiff and *Stephens* are estopped from denying that the legal estate passed by the deed of 1859, and our estate is fed by the subsequent reconveyance.

[The LORD CHANCELLOR, as to estoppel, referred to *Right* d. *Jefferys* v. *Bucknell* (4) and *Sturgeon* v. *Wingfield* (5).]

At all events, we cannot be ordered to give up the deeds. We received them regularly: *Wallwyn* v. *Lee* (6); *Perry Herrick* v. *Attwood* (7). No doubt when the Court decrees a sale it is usual to order the deeds to be delivered up, but the Act 15 & 16 Vict. c. 86, s. 48, which enables the Court to order a sale, left a discretion with the Court, and a sale will never be ordered where it would in any way affect the rights of any of the parties.

Mr. *Kay*, Q.C., and Mr. *C. Russell*, for the Plaintiff:—

In such a case as this a sale is a more appropriate relief than a foreclosure would be. If the Court grants us relief it will make the relief complete by ordering delivery of the deeds: *Phillips* v. *Phillips* (8). Foreclosure is no relief: *Colyer* v. *Finch* (9). The Defendants have chosen to raise by their answers all these questions, and if they fail we have a right to relief. As to not giving up the deeds, a purchaser might as well allege that he was in possession and ought not to be turned out: *Smith* v. *Chichester* (10) is an authority for delivery of the deeds. The Defendants do not merely plead that they are purchasers for valuable consideration, but they want a conveyance of the legal estate from

(1) Bunb. 298.
(2) 2 Wh. & T. L. C. 6, n.
(3) Law Rep. 7 Ch. 75.
(4) 2 B. & Ad. 278.
(5) 15 M. & W. 224.
(6) 9 Ves. 24.
(7) 2 De G. & J. 21.
(8) 4 D. F. & J. 208.
(9) 5 H. L. C. 905.
(10) 2 D. & War. 393.

Stephens. They want the deeds not only as a shield but as a sword, and under these circumstances the Court will order delivery of the deeds.

Mr. *Locock Webb*, for *Crealock.*

Mr. *Eddis*, in reply.

Nov. 10. LORD CAIRNS, L.C., stated the facts of the case as regarded *Stephens*, and expressed his opinion to be that, as regarded the appeal of *Stephens*, the decree of the Vice-Chancellor was in all respects right, and that the appeal must be dismissed with costs. His Lordship then continued :—

I come now to the case of the purchasers. As regards Mr. *Price*, he is not before the Court. He was dismissed from the suit, and, in my opinion, rightly dismissed, and I will only add one observation in order to contrast his case with that of the other purchasers. Mr. *Price* is entitled in a Court of Equity to say, "Whatever were the circumstances under which this receipt for the £1500 which I paid was signed by the Plaintiff, I paid my money and took my conveyance upon the faith of the receipt, and no equity existing between *Stephens* and *Crealock* on the one hand, and the Plaintiff on the other, can be used to defeat the title and the legal estate which I have obtained." In my opinion, therefore, as regards *Price*, he was entitled to be dismissed altogether from the suit.

Then, as to the other purchasers, who on this appeal were represented by Mr. *Eddis* and Mr. *Swanston.* We were very much pressed in the course of their very able argument with this, that these three Appellants were purchasers for value without notice, and that, therefore, no decree of a Court of Equity ought to be made against them. That they were purchasers without notice is, I think, admitted on all hands; but it remains to be ascertained what it is of which they were purchasers. Now, on that head it was contended, in the first place, that they had obtained a legal estate, and, of course, if they are purchasers for value without notice, and if they have obtained a legal estate, the

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clear rule of a Court of Equity would apply, namely, that their legal estate could not be taken away from them. But the way in which it was said they had obtained a legal estate was this: It was said that at the time when *Stephens* conveyed to them upon the occasion of their purchases, he had no legal estate, but that he afterwards, by virtue of the reconveyance to him, obtained a legal estate; that by the first conveyance he was estopped, and that the estoppel created by the first conveyance was, to use the technical expression applied to such cases, fed by the estate which *Stephens* acquired under the reconveyance, and that thus the legal estate became complete.

10 Ch D 21
18 Ch D 570

Now, in my opinion, that argument was founded altogether on a fallacy. There is no estoppel whatever in this case. The conveyances to the purchasers were innocent. They were ordinary conveyances by grant; the operative words of which, as is well known, would create no estoppel; and the estoppel, if it arose at all, would arise by virtue of the first recital in the conveyance. The recital was in substance the ordinary one in such cases. It recited that *Stephens* was seised or otherwise well and sufficiently entitled to the property in question, free from incumbrances. If the recital had been a recital simply that *Stephens* was seised, there might have been an estoppel, but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous. It is a recital which, in substance, amounts to a statement that he had an estate either at law or in equity, and the fact that it states that the estate, whatever it was, was free from incumbrances, creates no estoppel for the purpose of making the legal estate pass. There is, therefore, no estoppel operating so as to convey the legal estate to the purchasers.

What, then, is it which the purchasers are purchasers of? They are purchasers of the equity of redemption, which *Stephens* had to convey to them, and which he did convey to them by the purchase deeds. Had they anything more? It is said that they had in addition a contract with *Stephens* under the covenants for further assurance that if he obtained any further interest in the property he would convey it to them, and of the benefit of that contract they say they ought not to be deprived, and that they will be deprived of it if the reconveyance to *Stephens* is cancelled.

Now, first, as to their position as purchasers of the equity of redemption. Is it proposed by the present decree to deprive them of that? Certainly not. The present decree, on the contrary, treats them as purchasers of the equity of redemption, and merely calls on them to perform the duty which attaches to every owner of an equity of redemption—it calls on them to redeem within a limited time, or in default of redemption to be foreclosed; for I take a sale for this purpose to be equivalent to foreclosure. It is necessary to say that this question has been the subject of authority even in the House of Lords; but, apart from authority, it appears to me that the proposition only requires to be stated to make it clear, that calling upon the purchaser of an equity of redemption to redeem or be foreclosed is not taking away from him anything of that which he has purchased. Then, is there anything taken away from them which they are entitled to in respect of their contract for further assurance? It appears to me there is not, because the case of the purchasers now must be this: "We are entitled," they must say, "by virtue of this covenant, to require *Stephens* to pass to us any interest which he has acquired in this land, whether he acquired it by fair means or by fraudulent means." Now, let me test that in this way: Suppose the covenant for further assurance had been in this form: "I, *Stephens*, covenant that if hereafter I should acquire any further interest in this estate, whether I acquire it by fair means or by fraudulent means, I will convey it to you." Is that a covenant which a purchaser could have enforced? I think clearly not; and yet the purchasers must contend that they are entitled to maintain such a covenant at law, and to enforce it; otherwise they cannot object to this decree on that ground. In my opinion a covenant so framed would have been invalid as regards one alternative; and in my opinion the purchasers in this case could only insist on *Stephens* conveying to them what he acquired by fair and honest means.

Therefore, not adverting for the moment to the details of the decree, it seems to me to be a decree which a Court of Equity can rightly make against the purchasers to whom I have referred.

But then it is said that the decree is erroneous in point of form. In the first place, because it orders the delivery up by the purchasers of the title-deeds of the property. In that respect I assent

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to the argument of the Appellants. It appears to me clear, both upon principle and upon all the authorities which were cited, that it is the practice of the Court of Equity to take nothing away from a purchaser for valuable consideration of that which he has bought and holds. But something would be taken away if the title-deeds which he has received from one who at the time was the holder of them, and the apparent owner of the estate, were taken away. I asked the learned counsel at the bar if they could point out any case where, as against a purchaser for value without notice, the title-deeds had been taken; but no such case was produced, and I read the language of the cases cited, in particular in the case of *Hunt* v. *Elmes* (1), as authority that deeds under these circumstances cannot be taken from purchasers for value without notice.

The next objection made to the decree was on the score that in place of ordering a foreclosure it ordered a sale. It appears to me that, under the recent Act of Parliament (15 & 16 Vict. c. 86, s. 48), it is within the discretion of the Court in a mortgage suit whether a foreclosure or a sale shall be ordered; but a sale is not to be ordered as of course. There may be cases of complication where a sale is eminently desirable, and there may be cases where, by reason of there being little or no complication, or for other reasons, a sale ought not to be ordered by this Court. It is sufficient for me to say that in this case there appear to be no special reasons on the one hand why a sale ought to be ordered, and on the other hand there is at least one very special reason why it ought not. A Court of Equity is not in the habit of ordering a sale unless it can go on and complete the sale in every necessary way, giving possession and insuring that the title-deeds shall be handed over. I do not think that in this case, as against purchasers for value without notice, the Court can do either the one or the other; and under those circumstances I think the Court should rest satisfied with making that which would have been the ordinary form of decree before the statute, and decreeing simply foreclosure and not a sale.

In my opinion, upon the appeals of the purchasers the decree in those respects ought to be varied; but as I have said, the appeal of Mr. *Stephens* ought to be dismissed with costs.

(1) 2 D. F. & J. 578.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

With regard to the case of *Stephens*, it appears to me the moment his answer was read the case was really at an end. It is clear that, finding himself in pecuniary difficulties through the fraud of *Crealock* in the first instance, he unfortunately allowed himself to be mixed up in the subsequent grave misconduct of *Crealock* towards *Crealock's* co-trustee and *cestuis que trust*.

With regard to the purchasers, it appears to me that there are two cardinal principles and rules of this Court which are involved both on the one side and on the other. The first I take to be this, which in my opinion is a rule without exception, that from a purchaser for value without notice this Court takes away nothing which that purchaser has honestly acquired. If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this Court, in my opinion, has no right to interfere with him; and it would be, in my judgment, interfering with him, if, through the form of a decree directing a sale instead of a foreclosure, or anything of that kind, it merely did indirectly that which it would not do directly—deprive him of possession of land or deeds in favour of the Plaintiff. Therefore I entirely agree that that part of the decree must be altered so as to leave the purchasers in full possession of their deeds, and in the actual possession which they have got of the property itself.

Then there is another equally cardinal rule of this Court, that if a purchaser, however honest, on the completion of his purchase, acquires a defective title, that defective title this Court will not allow to be strengthened either by his own fraud or by the fraud of any other person. Therefore, in my opinion, this Court cannot allow the title to be strengthened by the fraudulent reconveyance to which the Lord Chancellor has adverted.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

I have nothing to add as to the case of *Stephens;* but with

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reference to the case of the purchasers, I agree with what has been laid down by the Lord Chancellor, that in this case there is no estoppel as to the legal estate alleged to have passed to the purchasers. It would have been a question of some difficulty whether, if the legal estate had, no matter by what means, got into the purchasers, it could have been got out of them; but, in my opinion, it is clear that it has not, for there is no estoppel, and I think that the case is governed by that of *Right* d. *Jefferys* v. *Bucknell* (1). The recital there was a recital that the person conveying was legally or equitably seised; but it was laid down by Lord *Tenterden*, in delivering the judgment of the Court, and it is no doubt a very old rule of law, that to create an estoppel the averment in the recital must be certain and precise; and it seems impossible to say that when the recital is that the conveying party is seised, or otherwise well entitled to an estate in fee simple, that means he is seised of a legal estate in fee simple; the reason being that the recital involves another alternative. It is difficult to see how a person can be entitled in fee simple otherwise than by being seised, except by having an equitable estate in fee simple. At any rate, the recital is capable of receiving that construction, and that is sufficient to prevent the estoppel arising.

Then, if there is no estoppel, it follows that the legal estate, when conveyed, remained in *Stephens;* and, although, no doubt, if he had obtained it honestly, he would have been a trustee for the purchasers, I am clearly of opinion that, if he did not obtain it honestly, the purchasers have no case to prevent the deed which he obtained dishonestly from being set aside. That point is directly decided by the case of *Eyre* v. *Burmester* (2). In that case the bank were purchasers for valuable consideration without notice, because they had obtained their conveyance and had advanced £95,000 before they discovered the mortgage of Mr. *Eyre*. Then they did discover it, and there was no doubt that, having discovered it, they made an agreement with *Sadleir* that he would procure a reconveyance. In the present instance the purchasers never discovered the defect in their title; but it appears

(1) 2 B. & Ad. 278. (2) 10 H. L. C. 90.

to me that can make no difference, because, when they try and set up the conveyance of the legal estate to *Stephens*, they are in effect availing themselves of a fraudulent conveyance. It makes no difference that a person believed that such a conveyance could be obtained, for he cannot avail himself of a conveyance obtained by fraud. It is contrary to every rule of equity that he should attempt to set up for his own advantage a conveyance tainted with fraud.

I, therefore, entirely agree that the purchasers cannot prevent the conveyance from being set aside, and I also agree that the rule of this Court in favour of a purchaser for valuable consideration without notice is so far in favour of the purchasers that they cannot here be ordered to deliver up the deeds.

Solicitors for the Plaintiff: Messrs. *Budd & Son.*

Solicitors for *Stephens:* Messrs. *T. White & Sons.*

Solicitors for *Pugh:* Messrs. *Combe & Wainwright.*

Solicitors for *Lewis Beavan*, and *Price:* Messrs. *Batty & Whitehouse.*

Solicitors for *Crealock:* Messrs. *Clarke, Son, & Rawlins.*

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[1872 S. 213.]

Power—Remoteness—Power to appoint by Will—Absolute Interest.

Where, under a special power, an appointment is made giving an invalid power of appointment with a gift over in certain events, the gift over is not invalidated by the invalidity of the power.

A power to appoint is not bad because it may be so exercised as to render the appointment void as being too remote.

A power to appoint to children absolutely may be exercised by giving a child an estate for life with power to appoint by will.

A testator gave certain property upon trust for his granddaughter *A.* for life, and after her death for her children, or some of them, as she should by deed or will appoint. *A.*, by her will, appointed one-fifth of the fund to each of five children (all of whom were living at the death of the original testator) for life, and directed that, after the death of each child, the share in

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which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment in favour of the survivors in different events:—

Held, a good exercise of the power of appointment.

Phipson v. *Turner* (1) followed.

Decision of Lord *Romilly*, M.R., affirmed.

3 Ch D 760
7 Ch D 696

WILLIAM BOUND, by his will, gave certain real estate and personal estate to trustees upon trust for his granddaughter, *Anna Maria Slark*, for her life, and after her death "In trust for all and every or such one or more exclusively of the other or others of the children or child born or to be born of the said *Anna Maria Slark* by the said *William Slark* the younger and any future husband and husbands, their, his, or her heirs, executors, administrators, and assigns respectively, with such provision for their respective maintenance, education, and advancement, and at such age, day, or time, or respective ages, days, or times, and if more than one in such parts, shares, and proportions, and charged with such annual sums of money and limitations over for the benefit of the said children, or some of them, or some of their heirs, executors, and administrators respectively, and upon such conditions, with such restrictions, and in such manner as the said *Anna Maria Slark* during her life, by any deed or deeds, instrument or instruments in writing to be by her sealed and delivered in the presence of and to be attested by two or more credible witnesses, or by her last will and testament in writing or any codicil or codicils thereto in writing, notwithstanding coverture, shall from time to time direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend"—in trust for such of the children of *Anna Maria Slark* as being sons should attain the age of twenty-one years, or being daughters should attain that age or marry.

William Bound died in 1846, and at the time of his death *Anna Maria Slark* had, living, six children, namely, a son, *William Slark*, a daughter, *Eliza Jane Cope*, and four other daughters.

By her will, dated the 8th of December, 1865, *Anna Maria Slark* directed that out of the funds subject to the trusts of the will of *William Bound*, an annuity of £100 a year should be paid

(1) 9 Sim. 227.

to one of the daughters; and directed that, subject thereto, the funds aforesaid should be held upon trust as to one-fifth share thereof to pay the income of such share to her daughter *Eliza Jane Cope* during her life for her separate use without power of anticipation. The testatrix made similar appointments as to the son and as to three of the said four other daughters, and directed that, subject as aforesaid, each one-fifth share should, after the decease of each son or daughter, be held "for such trusts, intents, and purposes as he or she respectively (and as regards any of my daughters, notwithstanding any coverture, and whether she respectively shall be covert or sole) shall by his or her will in writing, or any codicil or codicils thereto, or any writing in the nature of or purporting to be a will or codicil, direct or appoint." The testatrix then made provisions for the contingency of a son or daughter surviving her and leaving a child. The will then proceeded to say: "Provided always, and I further declare my will to be, that if my said son or any of them my said four last-named daughters shall die in my lifetime, or if my said son or any of them my said daughters after having survived me shall afterwards die without having had any child who shall be living at his or her respective decease, or who shall have previously died after having attained the age of twenty-one, then (in default of any direction or appointment to the contrary under the powers hereinbefore in that behalf contained) the said trustee or trustees do and shall from and after the decease of the survivor of my said husband and of myself and of my said son or (as the case may be) of each such daughter dying as aforesaid, be possessed of as well the share or shares hereinbefore originally appointed for him or during his or her life and made subject to his or her appointment as aforesaid, as the share or shares, by virtue of this present clause or proviso, surviving or accruing, or which, if he or she had been living, would have survived or accrued for his or her use, during his or her life, of and in the said trust estates, moneys, stocks, funds, and securities, in trust for the survivor or survivors or others or other of my said son and four last-named daughters, and if more than one, in equal shares, but so that the share or shares of each of them under this proviso shall go and be upon and for such and the same or

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the like trusts, intents, and purposes as are hereinbefore declared concerning his or her original share."

Anna Maria Slark died in 1871. *Eliza Jane Cope* had died in 1870, leaving a husband and a child her surviving.

The suit was instituted for the administration of the estate of *William Bound;* and the question arose whether the share given to *Eliza Jane Cope* for life was well appointed after her death.

Lord *Romilly,* M.R., held that the appointment was good; as reported (1); and made a decree that the will of *Anna Maria Slark* operated as a valid and effectual appointment under the power given to her by the will of *William Bound;* and that by virtue of the said appointment, and subject to the annuity of £100, *William Slark* and the other three daughters were each entitled to one equal fourth part of the trust property for life, with power for each of them to appoint his or their share by will, and that the life-interests of the other three daughters were limited to them respectively for their separate use without power of anticipation during any coverture.

The husband and the child of *Eliza Jane Cope,* who were taken to represent her in the suit, appealed.

Mr. *Fry,* Q.C., and Mr. *Warmington,* for the Appellants:—

We admit that the gift to *Eliza Jane Cope* for life is good, but we say that the gift to her of a power of appointment by will is bad, and therefore the gifts over fail. The consequence is that the gift over in the original testator's will comes into effect, and we, as representing *Eliza Jane Slark,* one of the children, obtain a share: *Sugden* on Powers (2).

The power given to *Eliza Jane Cope* to appoint by will is bad, both as being too remote, and as not authorized by the power given by the will of *William Bound.* It might have been given to a child of *Anna Maria Slark* born after the death of the testator, and that would have been against the rules as to perpetuities, inasmuch as the property could not have been dealt with during the life of the child. The difficulty was got over in *In re Teague's Settlement* (3) by rejecting the restraint against anti-

(1) Law Rep. 15 Eq. 307. (2) 8th Ed. p. 508.
(3) Law Rep. 10 Eq. 564.

cipation; but that shews what the rule is. *Wollaston* v. *King* (1) and *Morgan* v. *Gronow* (2) are also authorities on this point.

Besides, it is an invalid exercise of the power given by *William Bound's* will, for the testatrix could give an interest, but had no right to give a power which is not an interest. A power to appoint by deed or will would have been good, as the daughter might then have appointed to herself. We admit, however, that we cannot distinguish this case from *Phipson* v. *Turner* (3).

Moreover, we contend, on the construction of the gift over, that it does not apply to the case which has happened.

Mr. *Chitty*, Q.C., and Mr. *A. T. Watson*, for the Plaintiff:—

Even if the power given to *Eliza Jane Cope* to appoint by will is invalid, the gift over is good: *Webb* v. *Sadler* (4).

Mr. *Fry*, in reply.

LORD CAIRNS, L.C., expressed his opinion that, even if it was possible to impeach the validity either of the power or the manner in which that power was exercised, still, on the construction of the will, there would stand a separate independent gift over in the event of one child dying in the lifetime of the testatrix; and as to that no question could arise.

His Lordship then proceeded to say:—But as two other arguments were adduced, and as the decree goes on to state the conditions under which the children will take, it may be convenient that I should express my opinion on those points.

As to the question of perpetuity, the arguments adduced have no bearing whatever. There is no doubt that, under the power which the original testator by his will gave to his granddaughter, she might have given a power to appoint to children born after his death, and might, therefore, have contrived to give interests which would be void under the rules against perpetuities. But it does not follow that because the original power might have been badly exercised, yet, if it is so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void. Power to appoint amongst issue *primâ facie* means

(1) Law Rep. 8 Eq. 165.
(2) Ibid. 16 Eq. 1.
(3) 9 Sim. 227.
(4) Law Rep. 8 Ch. 419.

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indefinite issue, and might include persons beyond the line, but the question in all cases is what has been done. The appointment made by Mrs. *Slark* clearly did not offend against the rule against perpetuities, for she appointed to those children only who were existing at the date of the death of the testator.

The other question is this: The original testator provided that his granddaughter might appoint, and she appointed to her children for life, and gave to each child power to appoint her share by will. It is said that this is not warranted by the original power, that the life interest was a good interest, but that the power to appoint by will was not warranted by the original power. It appears to me, however, that the appointment was warranted by the original power. It was said that the testatrix might give a life interest or an absolute interest, but that a power to make a will was different, inasmuch as one is property and the other is a power. Yet, taking the whole together, it appears to be simply a mode of enjoyment which was carved out of the absolute interest. An absolute interest might have been conferred, and it was equally competent to a person exercising the power to give something short of an absolute interest. In whatever way the power so given was to be exercised, whether by deed or will, or by deed alone, or by will alone, appears to me immaterial.

But the matter is entirely covered by authority, and it would be a grave danger for this Court now to disturb an authority so early as the decision of the Vice-Chancellor *Shadwell* in *Phipson* v. *Turner* (1), which has been followed without hesitation in more than one case, and has been adopted in the practice of conveyancers, and approved of by Lord *St. Leonards* in his well-known treatise on Powers (2).

It appears to me that both on principle and on authority this power was properly exercised by Mrs. *Slark* in her will, and that the surviving daughters have power to appoint by will.

The appeal will be dismissed.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *H. P. Bird*; Mr. *E. G. Bradley*.

(1) 9 Sim. 227.

(2) 8th Ed. p. 683.

Ex parte OSBORNE. *In re* GOLDSMITH.

L. C. and L. JJ.
1874
Nov. 6.

Benefit Building Society—Mortgage—Power of Sale—Right of Society to Payments in respect of Interest after Repayment of Principal.

A member of a permanent benefit building society obtained an advance in respect of his shares on his executing a mortgage in the form prescribed by the rules, by which he was to pay the principal and interest at £5 per cent. by monthly subscriptions extending over seven years. The deed contained a power of sale by the trustees of the society in case of default in payment of the subscriptions, and it was declared that the trustees should retain out of the purchase-money, after payment of expenses, "all such subscriptions, fines, and other sums of money and payments which should be then due, or which should afterwards become due, in respect of the said shares during the remainder of the period of seven years, it being agreed that in case of any such sale, all the moneys which would at any time afterwards become due from the mortgagor in respect of the said shares, according to the rules of the association, should be considered as then immediately due and payable: and should pay the residue of the purchase-money to the mortgagor." The mortgagor paid a few of the subscriptions and then fell into arrear, and the mortgaged property was sold by the trustees:—

Held, that the trustees of the society were entitled to retain out of the proceeds of the sale all subscriptions and fines payable up to the time of the completion of the sale, and such further sum as represented the balance of the principal sum remaining at that time unpaid, but that they were not entitled to any payment in respect of interest accruing after the principal had been all repaid.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

The bankrupt, *George Goldsmith*, in March, 1871, became a member of the *London and Suburban General Permanent Building Society*.

The following are the rules of the society which bore upon the questions in dispute:—

"1. The object of the society is to raise by the subscriptions of its members, and in shares of £50 each, payable by monthly instalments of 10*s*. per share, a fund out of which each member shall receive the amount or value of his share for the erection or purchase of a dwelling-house or dwelling-houses, or other real or leasehold estate.

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"2. Every person subscribing for a share shall be a member.

"3. Every member on entering the society, or taking an additional share, shall pay an entrance fee of 2*s.* 6*d.* per share, 1*s.* 6*d.* of which shall be paid to the profit account of the society and 1*s.* to the secretary for registration; and shall at the first subscription meeting of the society, to be held at a time and place to be appointed by the board, and thereafter at the usual subscription meetings in every succeeding month, pay his subscription of 10*s.* per share, with the option of paying in advance such amount and on such terms as the board may determine, until the amount or value of his share shall have been realised."

"6. Members shall be fined for not paying their subscriptions or instalments at the rate of 6*d.* per pound for each and every month, or for any portion of a month, during which such subscription or instalment shall be in arrear."

"8. The funds of the society shall be advanced to the members or invested in such manner, on such terms, and upon such mortgage of freehold, copyhold, or leasehold tenure as the board shall determine.

"9. Any member receiving an advance shall repay the same with interest at the rate which shall be determined by the board by monthly or other instalments, and the board shall have power, at the borrower's request, to extend or shorten the period of such repayment.

"10. Any member or other person becoming entitled to receive an advance shall execute such a mortgage or security of the premises as the solicitors of the society shall require."

"15. Any member may withdraw all the money he shall have paid by way of subscriptions, together with the allotted profit thereon (after deducting all fines due from him) at any time, on giving one calendar month's notice at a monthly meeting."

"18. At the end of every year such portion of the profits realised as the board shall think equitable shall be carried to a reserved fund, and the remainder shall be placed to the credit of the holders of unadvanced subscription shares who have subscribed for one year and upwards, but not to be paid until the shares are realised."

Each member was presented, besides a copy of the rules, with a

printed prospectus containing further explanations of the system of the society. In the prospectus it was stated as follows:—

"Borrowing members, to suit their convenience, may fix their own time during which the instalments on their advances shall be payable according to the following scale:—

			£	*s.*	*d.*
"For every £100 advanced,					
"To be repaid in 3 years, a monthly payment of			3	3	10
,,	5	,, ,,	2	1	8
,,	7	,, ,,	1	12	2
,,	&c.	,, ,,		&c.	

"The above instalments amount in all cases to £5 per cent. per annum for the term selected, added to the principal sum borrowed and distributed in monthly payments throughout the term. Quarterly payments (if preferred) will be received. Members requiring advances have the full amounts of their shares advanced to them.

"A borrowing member may at any period sell, exchange, or redeem his property on equitable terms."

The bankrupt subscribed for twelve shares in the society, and received the advance of £600, to which he was entitled.

On the 4th of March, 1871, the bankrupt executed a mortgage in the form approved by the solicitor of the society. By this deed, which was made between *Goldsmith* of the first part and the trustees of the society of the other part, after reciting that *Goldsmith* was a member of the society, and had subscribed for twelve shares therein, and by the rules of the society was entitled to receive as an advance out of the funds of the society in respect of the said shares, the sum of £600, which had that day been paid to him by the trustees; that *Goldsmith* had elected, under the rules of the society, to repay the said sum of £600, and the subscriptions, fines, and other payments to become due thereon, in the period of seven years from the date of the deed; it was witnessed that *Goldsmith* demised to the trustees fourteen leasehold houses in *Lambeth* for the term on which the same were held, less the last day thereof: Provided always, that if *Goldsmith*, his executors, administrators, or assigns, should duly make and pay the several subscriptions, fines, and other payments which should become due and payable

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from him or them in respect of the said shares, and of the said sum of £600 advanced as aforesaid, and observe and perform all the rules and regulations of the society in respect of the said shares or of the mortgage deed, or the premises expressed to be thereby demised, which on his or their part ought to be paid, observed, and performed, the said shares being treated as shares the advance upon which was to be repaid in seven years, and should also duly pay the rent and perform the covenants of the original lease, and also the covenants and conditions of the mortgage deed, then the trustees of the society would indorse on the mortgage deed a receipt for all moneys intended to be thereby secured according to the form annexed to the rules and regulations, or otherwise surrender the said premises unto *Goldsmith*, his executors, administrators, or assigns: But if default should be made in performance of the said proviso or any part thereof, it should be lawful for the board of directors of the society to authorize the trustees at any time after such default to appoint a person to collect the rents and profits of the said premises thereby demised; and also, if such trustees should think fit, absolutely to sell the said premises thereby demised, or any part thereof in manner therein mentioned. And it was declared that the said trustees should, out of the money arising from such sale, and the rents and profits of the said premises which should be collected as aforesaid, first retain the costs and expenses occasioned by the non-payment of the said subscriptions, fines, and other moneys, or incurred in the execution of any of the powers of the mortgage deed, or in any other way connected with the said premises, and in preserving the said premises from forfeiture by paying the rent or performing the covenants of the original lease, and of obtaining possession or enforcing the performance of any contract for the sale of the said premises, and in the next place should retain all such subscriptions, fines, and other sums of money and payments which should be then due, or which would afterwards become due in respect of the said shares during the then remainder of the said period of seven years, it being agreed by the said parties thereto that in case any such sale should take place all the moneys which would at any time afterwards become due from *Goldsmith*, his executors, administrators, or assigns, in respect of the said shares

according to the rules of the said association, should be considered as then immediately due and payable; and lastly, should pay the residue of the said moneys (if any) to *Goldsmith*, his executors, administrators, or assigns.

Goldsmith only paid two instalments of £9 13*s.* each, and on default being made in the third instalment the trustees entered into possession of the mortgaged premises. On the 3rd of October, 1872, *Goldsmith* was adjudicated a bankrupt.

The trustees afterwards sold the property to the *London* School Board for £912, which sale was completed on the 9th of January, 1874. They had also received £507 16*s.* 6*d.* from the rents and profits of the premises, out of which they had paid a considerable sum for ground rent, rates, and taxes. The result of the account was, that the society had a balance in hand on account of the premises of £1176, and they claimed to retain out of that sum the whole amount of the monthly instalments of £9 13*s.* to the end of the seven years, together with the fines due for payments in arrear down to the time of the sale. On the other hand, the trustee in the bankruptcy contended that the trustees of the society were only entitled to retain the instalments and fines due before the completion of the sale, and so much of the principal sum of £600 as remained unpaid at the time of the sale, but that nothing could be allowed on account of interest after the principal had been repaid. The Registrar decided that the trustees of the society were entitled to the whole sum claimed by them, and the trustee in bankruptcy appealed from this decision.

Mr. *Little*, Q.C., and Mr. *Bagley*, for the Appellant:—

The instalments are composed partly of interest, and it is unreasonable that the society should retain interest on the principal after it has been repaid. The rules do not provide for the case of a mortgage being redeemed or realised by sale of the mortgaged estate; nor do they prescribe the amount of the instalments nor the rate of interest. The question must, therefore, turn on the meaning of the mortgage deed. And it is remarkable that in the trust for the application of the proceeds of the sale, the trustees have power to retain all sums which may become due in respect of the "shares" during the remainder of the term of seven years,

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but nothing is said about payments in respect of the money advanced, or interest thereon, after the principal has been repaid.

[They were stopped by the Court.]

Mr. *Finlay Knight*, and Mr. *E. Pollock*, for the trustees of the society:—

The printed prospectus was issued by the board, and was furnished to each member with the rules, and they must be taken together in interpreting the mortgage deed. It is not an ordinary mortgage, but a special contract; the contract was, not to repay the principal with interest, in the ordinary way, but to pay certain monthly subscriptions for seven years. It was, in fact, a purchase by the society of an annuity for that time. If the mortgagee wished to redeem, he might apply to the directors, who would allow him to do so on equitable terms; but he could not force them to accept the principal, and at once put an end to further instalments without their consent. The mortgagee cannot, by his own default, place the society in a worse position than if he had voluntarily redeemed: *Mosley* v. *Baker* (1); *Seagrave* v. *Pope* (2).

LORD CAIRNS, L.C.:—

The manner in which the mortgage deed is expressed and in which the rules are worded creates an unnecessary amount of obscurity; but, after careful attention to the language of these documents, I have no doubt as to the real nature of the transaction. Denuded of technicalities, it is an advance in respect of the shares to which *Goldsmith* was entitled; and if the 9th rule be taken in connection with the prospectus (as I think it must be taken, for there is nothing else to fix the rate of interest), it appears to me clear that, for the purpose of this mortgage, *Goldsmith* was treated as if he had received an advance of £600 at £5 per cent; but the way in which this was done was, that it was agreed that the repayment should be spread over seven years, by monthly instalments, each instalment to be made up by a portion of interest and a portion of principal. If that be so, one would, in the absence of any stipulation to the contrary, suppose that, if

(1) 6 Hare, 87; S. C. on appeal 18 L. J. (Ch.) 457.

(2) 1 D. M. & G. 783; see also *Matterson* v. *Elderfield*, Law Rep. 4 Ch. 207.

default was made in payment of any of the instalments, and the property were sold, all that was due for monthly instalments and for fines was to be paid out of the proceeds of the sale, but that with regard to the future, so much of the principal sum as remained unpaid having been paid off there would be nothing in respect of which interest could accrue. Interest implies forbearance, and therefore when the whole is paid there can be no interest. That seems the natural result of the transaction, and the trust of the sale moneys in the mortgage deed is consistent with that view. It is there provided that the trustees, after payment of the expenses of the sale, shall "retain all such subscriptions, fines, and other sums of money and payments which shall be then due or which would afterwards become due in respect of the said shares during the then remainder of the said period of seven years, it being agreed by the said parties hereto that in case any such sale shall take place all the moneys which would at any time afterwards become due from the said *G. Goldsmith*, his executors, administrators, or assigns, in respect of the said shares, according to the rules of the said association, shall be considered as being immediately due and payable." With regard to the future, you cannot include under "moneys which would at any time afterwards become due" any fines; no more can you include payments in respect of interest, for interest can only arise in respect of a principal sum remaining outstanding and forborne. Therefore my conclusion is, that everything due in respect of monthly instalments and fines at the time of the sale must be retained; and then it must be ascertained how much of the monthly payments represented principal and how much interest, and it will then appear how much of the principal remained unpaid. That must also be retained, and that will conclude the transaction.

SIR W. M. JAMES, L.J., concurred.

SIR G. MELLISH, L.J.:—

I am of the same opinion. According to the rules of this society this was not strictly an advance in anticipation of the sum eventually payable to the member in respect of his shares, as it was in other cases which had been before the Courts; but the 9th

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rule says that any member receiving an advance shall repay the same with interest at the rate which shall be determined by the board, that is at £5 per cent. He was, therefore, not only to receive an amount equal to his subscriptions, but he was to repay any amount which might be advanced, which might be more, or might be less, than the amount of his shares. The deed must be construed in accordance with the rules. Interest could never become due if the principal was paid off, and therefore interest could not be said to be "moneys which would become due in respect of the shares, according to the rules of the association;" and those were the words used in the deed.

Solicitor for the Appellant: Mr. *J. Finch.*
Solicitor for the Respondents: Mr. *C. Etherington.*

L. C. and L. JJ.
1874
Nov. 6, 13.

Ex parte BALL. *In re* ADAMS.

Unregistered Company—Winding-up—Proof against Estate of Bankrupt Contributory in competition with Separate Creditors—Companies Act, 1862, *s.* 95, *sub-s.* 5, 199, 200, 204.

Where an unregistered company is wound up under the 199th section of the *Companies Act*, 1862, and a contributory becomes bankrupt, the official liquidator may prove under sect. 95, sub-sect. 5, of the Act for any sum due from the bankrupt's estate as a separate debt in competition with the separate creditors, in like manner as in the case of a registered company.

THIS was an appeal from a decision of Mr. Registrar *Roche*, sitting as Chief Judge in Bankruptcy.

In the month of September, 1871, four firms of merchants in *London*, namely, Messrs. *Fox Brothers;* Messrs. *Merry, Willis, & Lloyd;* Messrs. *Malcolm & Co.*, and Messrs. *W. J. & A. W. Adams*, comprising altogether eight persons, associated themselves together in a joint adventure for trade between *England* and *Africa*, and executed articles of partnership dated the 18th of September, 1871, under which the four firms were entitled to the profits in equal shares. The association was called the *Adansonia Fibre Company*, but was not incorporated or registered under any Act of Parliament.

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On the 22nd of February, 1873, the company was ordered to be wound up under the 199th section of the *Companies Act*, 1862.

W. J. Adams, a member of the firm of *W. J. & A. W. Adams*, soon afterwards presented a petition for liquidation, and a trustee of his estate was appointed.

The official liquidator in the winding-up of the company estimated the amount of calls which would become due from the firm of *W. J. & A. W. Adams* at £92,000, and he applied to enter a claim against the estate of *W. J. Adams* for that amount. The Registrar rejected the claim, and from this decision the official liquidator appealed.

Mr. *Rodwell*, and Mr. *Finlay Knight*, for the Appellant:—

The ground of the Registrar's decision was that the claim was in violation of the rule that the joint creditors of a firm could not prove against the separate estate of a partner in competition with the separate creditors. But this partnership being wound up under the *Companies Act*, 1862, the official liquidator is expressly empowered by sect. 95, sub-sect. 5, to prove against the estate of a contributory in competition with the separate creditors.

Then the 199th section gives power to wind up unregistered companies consisting of more than seven members, and enacts that "all the provisions of the Act with respect to winding up shall apply to such companies," with certain exceptions and additions not relating to the present case. And the 200th section, after defining a "contributory" in an unregistered company, then enacts, that in the event, among other things, of the bankruptcy of a contributory, the provision thereinbefore contained with respect to the assignees of a bankrupt shall apply. A similar provision as to proof against the estate of a bankrupt contributory was contained in the *Winding-up Act*, 1849 (12 & 13 Vict. c. 108), s. 30, and was the subject of a judicial decision in *Ex parte Nicholas* (1). The extent to which the previous sections of the Act will be held applicable to unregistered companies wound up under the 199th section is exemplified in *In re Muggeridge* (2). The 204th section has also an important bearing upon the question (3).

(1) 2 D. M. & G. 271. 17 Jur. 6
(2) Law Rep. 10 Eq. 443.
(3) See the section set out in the Lord Chancellor's judgment.

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Mr. *G. W. Lawrance*, for the trustee in the liquidation:—

The case of *Ex parte Nicholas* (1) is not applicable, because the company in that case was a joint stock banking company, and therefore a *quasi* corporation; but this is an ordinary partnership, and if it happened to consist of only seven persons it could not have been brought under the Act at all. It would be most unreasonable if the estate of a member of a partnership consisting of eight persons should be distributed on a different principle to the estate of a member of a partnership consisting of seven. The 5th sub-section of the 95th section was not intended to apply to such a partnership, but only to companies.

LORD CAIRNS, L.C.:—

It appears to me impossible in this case to depart from the precise enactment of the Act of Parliament. It might be supposed that that enactment had dropped in *per incuriam*, but upon the whole I am bound to say that I do not think it was inserted *per incuriam*. I think, when you take the 199th section in conjunction with the 204th, and observe the very careful arrangement of the Act into different Parts, that Part VIII., relating to unregistered companies, has been carefully considered and applied deliberately in all its provisions to the winding-up of companies like the present, and it seems to me that it is impossible not to say that it was an intentional provision which was inserted in the 5th sub-section of the 95th section, and that it was intended to apply that sub-section to companies wound up under the 199th section. I am bound to say, without entering into the question, which is not within our province, of the policy of the Act, that it seems quite possible that there may have been a policy in what was done, and that it may have occurred to the Legislature that, with regard to a company of this kind, large enough in the number of its partners to be made the subject of winding-up under this Act, the best mode of winding up such a company was at once to make everything that could be called up from the contributories and from individual partners a separate debt, to be proved in competition with the separate creditors. That is, as it seems to me, intelligible policy. Whether it is the best policy to be

(1) 2 D. M. & G. 271.

adopted or not, I do not stop now to consider; but it appears to me that the wording of the Act is clear and precise, that a company of this kind may be wound up under the 199th section, and that when it is wound up under that section all the provisions of the Act shall apply to such company, with certain exceptions and additions, which do not touch the present case. Then the 204th section, the concluding section in Part VIII. of the Act, provides thus:—"The provisions made by this Part of the Act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions hereinafter contained with respect to winding up companies by the Court, and the Court or official liquidator may, in addition to anything contained in this Part of the Act, exercise any powers to do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part of this Act." Then this Part of the Act, namely, in the 199th section, having provided that all the provisions of the Act in respect to winding up shall apply, the 95th section enacts, with regard to the official liquidator, that he shall have power, with the sanction of the Court, to do certain things; and under the fifth head of his duties and powers we find a power which alone entitles him to prove in the present case:—"To prove, rank, claim, and draw a dividend in the matter of the bankruptcy or insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy or insolvency or sequestration, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors." No person can doubt that in this Part of the Act, and with regard to companies other than a company like the present, there was a clear and deliberate policy that contributions should be proved as separate debts. The Act having said that a company of this kind shall be subject to the provisions under the winding-up, one of those provisions directing a special mode of proof, what right have we to say that a different

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mode of proof shall be insisted upon? In my opinion the Court has no option in this matter, and the trustee must be directed to receive this proof.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellant: Messrs. *Paine & Layton.*
Solicitors for the Respondent: Messrs. *Linklater & Co.*

L. C. and L. JJ. 1874 *Nov.* 13.

Ex parte GILLEBRAND. *In re* SIDEBOTHAM.

Bankruptcy—Practice—Trial of Issue before Judge—Judge's Notes—Power of Court of Appeal to disregard finding of Judge—Bankruptcy Act, 1869, *s.* 72.

Where an issue of fact has been tried before a Judge under the 72nd section of the *Bankruptcy Act,* 1869, and the Court of Appeal is furnished with the Judge's notes of the trial, they are conclusive as to the evidence adduced before him, and the Court will not receive the notes of a shorthand writer except by consent of both parties.

The Court of Appeal is not bound to accept as conclusive the finding of the Judge on the trial of such an issue.

THE bankrupts in this case were *Nathan Sidebotham* and *James Marsh,* who carried on business as machinists at *Ashton-under-Lyne* under the style of the *Barfield Ironworks Company.* They were adjudicated bankrupt on the 21st of November, 1873, in the *Manchester* County Court. On the 17th of July, 1873, *N. Sidebotham* gave a promissory note for £1000, drawn in the name of the firm, to his brother *John Sidebotham,* in return for certain bills which the latter accepted for the accommodation of the firm; and shortly afterwards *John Sidebotham* indorsed the promissory note to the trustees of his marriage settlement in return for a note for the same amount which he had previously given them. The trustees of the marriage settlement claimed to prove against the partnership estate for the promissory note. The trustee in the bankruptcy resisted the claim, and the Judge of the County Court directed an issue to be tried before himself as to the circumstances under which the note was drawn and indorsed.

The issue was accordingly tried before the Judge, without a jury, on the 4th of May, 1874, when the Judge was of opinion that the note of the 17th of July, 1873, was the note of the *Barfield Ironworks Company*, and bound the firm; that *John Sidebotham*, when he took the note, believed that the note was given with the authority and for the purposes of the firm, and that the trustees were *bonâ fide* holders of the note for value. He accordingly made an order allowing the trustees to prove for the full amount of the note.

From this order the trustees in the bankruptcy appealed to the Chief Judge in Bankruptcy, who affirmed the decision of the Judge of the County Court, and the trustees again appealed from this decision.

The notes of the County Court Judge were furnished and verified, and put in evidence on the appeal. The Appellant also had notes by a shorthand writer of the examination of the witnesses before the County Court Judge, which were verified by the affidavit of the shorthand writer.

Mr. *Roxburgh*, Q.C., and Mr. *Finlay Knight*, for the Appellant, offered to read the notes of the shorthand writer, which gave the evidence more in detail.

Mr. *Benjamin*, Q.C. (Mr. *Hamilton Humphreys* with him), for the Respondent, objected to the admission of the shorthand notes in evidence. He did not agree that the notes were correct, and he contended that when the notes of the Judge had been produced and verified they must be taken as conclusive of the effect of the evidence.

LORD CAIRNS, L.C.:—We are of opinion that when the Judge's notes are produced, and purport to contain a full record of what took place on the trial, they must be taken as the sole materials on which the Court of Appeal can proceed, unless the parties agree to use the shorthand notes. As the parties have not agreed in this case, we cannot receive the shorthand notes.

Mr. *Benjamin*, Q.C., then contended that, as no new trial of the issue had been applied for, the finding of the Judge was conclusive

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as to the facts. He referred to the 72nd section of the *Bankruptcy Act*, 1869.

Mr. *Roxburgh*, Q.C., referred to *Ex parte Norton* (1).

LORD CAIRNS, L.C.:—We are satisfied that there is nothing in the statute to bind the Court to any technical rules in reviewing the result of the trial of an issue of fact by a Judge under the 72nd section.

The case was then argued upon the evidence as stated in the notes of the County Court Judge.

THEIR LORDSHIPS held that the County Court Judge had come to a right conclusion, and dismissed the appeal with costs.

Solicitors: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale & Co., Manchester*; Mr. *E. Storer, Manchester.*

(1) Law Rep. 16 Eq. 397.

In re DONISTHORPE (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION.)

In re THOMSON'S TRUST DEED.

L. JJ.
1874
Nov. 7.

Creditors' Deed—Bankruptcy Act, 1861—*Trustee Acts—Appointment of New Trustee.*

2 L.R. 551.

Where one of the trustees of a creditors' deed registered under the *Bankruptcy Act*, 1861, has become of unsound mind, the Lords Justices sitting in Lunacy have jurisdiction under the Trustee Acts to appoint a new trustee.

THIS was a Petition by three creditors, on behalf of themselves and the other creditors entitled to the benefit of a trust deed executed by *B. Thomson*, to appoint a new trustee of that deed.

The deed was a creditors' deed, dated the 24th of November, 1864, and registered under the *Bankruptcy Act*, 1861, on the 21st of December, 1864. By this deed the debtor's estate was vested in *Butler* and *Donisthorpe*.

Donisthorpe having become of unsound mind, this Petition was presented for the appointment of a new trustee and a vesting order.

The creditors who had executed the deed were upwards of fifty in number. The Petitioners were the three largest creditors, representing in value above 13-16ths of the debts.

Mr. *G. Williamson*, for the Petitioner, referred to *In re Price's Trust Deed* (1) and *In re Raphael's Trust Estate* (2), and submitted that the jurisdiction was in Lunacy and not in the Court of Bankruptcy.

THEIR LORDSHIPS made an order as prayed.

Solicitors: Messrs. *Williamson, Hill, & Co.*

(1) Law Rep. 6 Eq. 460. (2) Law Rep. 9 Eq. 233.

L. JJ.
1874
Nov. 7.

In re EARL OF BERKELEY'S WILL.
In re GLOUCESTER AND BERKELEY CANAL ACT, 1870.

Lands Clauses Consolidation Act, 1845, *s.* 73—*Costs of Tenant for Life.*

A tenant for life opposed the passing of a canal bill, but only obtained the insertion of some clauses for the protection of the estate. The *Lands Clauses Act* was incorporated with the Act when passed. After its passing the company took part of the settled estate and paid the money into Court. In the proceedings for ascertaining the value of the land taken, the tenant for life had incurred costs beyond what the company were liable to pay, and he presented a petition for payment of these costs and of the costs of opposing the bill out of the fund. The Master of the Rolls having declined to make any order:—

Held, that the Petitioner was entitled to be paid out of the fund all costs properly incurred by him in relation to the purchase since the passing of the Act, but not any costs of opposing the bill in Parliament.

THIS was a Petition by Lord *Fitzhardinge*, which was mentioned to the Lords Justices by leave of the Master of the Rolls.

On the death of *Maurice* Baron *Fitzhardinge*, on the 17th of October, 1867, the Petitioner became entitled in possession as tenant for life to the family estates derived from the Earl of *Berkeley*, subject to several life annuities and sums charged for portions.

In 1870 the *Gloucester and Berkeley Canal Company*, which had been incorporated in the reign of *George* III., brought into Parliament a bill authorizing them to extend their works. The principal part of the land which would be required for their proposed alterations, if the bill became law, was part of the settled estates.

The Petitioner opposed the bill in both Houses of Parliament, but did not succeed in procuring its rejection. He, however, obtained the insertion of several clauses for the protection of the settled estates. The bill was passed under the short title of the "*Gloucester and Berkeley Canal Act*, 1870," and it incorporated the *Lands Clauses Act*, 1845.

In June, 1870, the company served the Petitioner with notice to treat for parts of the settled estates which they required to take. The Petitioner thereupon employed a surveyor to value the property and advise on the claim to be made. On the 16th of

August the Petitioner sent in a claim for £28,100. On the following day the company gave notice of their intention to summon a jury, and offered £15,237. The Petitioner gave notice of his desire to have the compensation settled by arbitration. The company accordingly appointed an arbitrator, and on giving notice of the appointment to the Petitioner, they increased their offer to £17,000. The Petitioner then appointed an arbitrator, and afterwards employed two fresh surveyors to value the property, and both advised him that £17,000 was too little. The arbitration therefore went on, and the umpire ultimately settled the compensation at £16,400. This sum was paid into Court under the *Lands Clauses Act*, and in May, 1871, an order was made for its investment, and for payment of the dividends to the Petitioner.

The Petitioner now applied to have the principal part of the purchase-money invested in the purchase of certain lands, of which he was the owner in fee, at the price which he had paid for them, amounting to £14,371. The Petition also stated that the Petitioner had incurred costs amounting to £713 in opposing the bill in Parliament, and that his costs of the arbitration amounted to £876. The company disputed their liability to pay the costs of the arbitration on the ground that the offer of £17,000, being more than the Petitioner had recovered, had been made before he had named an arbitrator. The Petitioner had obtained a mandamus calling on the company to shew cause why they should not pay them, and the case stood for argument on the 7th of November, 1874.

The Petitioner prayed that £1590, the total amount of the above costs, might be raised and paid out of the fund in Court, the Petitioner undertaking to make good to the *corpus* of the settled estates the amount (if any) which he should recover from the company; and for the usual directions as to the reinvestment in land. The Petition was served on the company only.

The Master of the Rolls doubted his jurisdiction to make any order as to the £1590 costs, but gave leave to mention the Petition to the Lords Justices.

Mr. *J. Pearson*, Q.C., and Mr. *W. Renshaw*, for the Petitioner, referred to *Pole* v. *Pole* (1); *Bright* v. *North* (2); *Re Aubrey's*

(1) 2 Dr. & Sm. 420. (2) 2 Ph. 216.

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In re GLOUCESTER AND BERKELEY CANAL ACT, 1870.

Estate (1); *In re Strathmore Estates* (2); *Lands Clauses Consolidation Act* (8 Vict. c. 18), s. 73.

SIR W. M. JAMES, L.J.:—

I am of opinion that the orders made by Vice-Chancellor *Stuart* and Vice-Chancellor *Malins* in the cases which have been cited —orders similar to which have, to the best of my recollection, been made by myself when Vice-Chancellor—were fully warranted by the practice of the Court and the principles of equity. The effect of the *Lands Clauses Act* is to make the tenant for life in possession of a settled estate the Parliamentary agent to contract for and on behalf of the estate, and to do the best he can for it. It would be contrary to common sense and common justice to say that a person in such a position is not entitled to as full an indemnity against his costs, charges, and expenses properly incurred as any other fiduciary agent. Here the tenant for life, acting *bonâ fide*, endeavoured to obtain from the company as good terms as he could for the estate, and he succeeded in obtaining, not, indeed, all that he asked, but more than was originally offered. The sum which the company have paid is now in Court, and ought to be reinvested in land; but this ought to be done according to equitable principles, and the costs, charges and expenses of the agent, properly incurred, ought in the first place to be paid out of the fund. I cannot, however, extend this principle to the costs of opposing the bill in Parliament. That opposition took place before any fiduciary relation was existing: the then tenant for life might have died before the passing of the Act, and the next tenant for life would have become the Parliamentary agent to the estate. I cannot, therefore, see my way to giving the Petitioner these costs. The Legislature has provided no way in which they can be charged on the estate. The order, therefore, will be that all the costs, charges, and expenses properly incurred by the Petitioner subsequently to the passing of the Act shall be taxed and paid out of the fund. A short petition of appeal must be presented stating that the Petition was presented to the Master of the Rolls, and that he declined to make an order, and our order will be drawn up upon this appeal petition.

(1) 17 Jur. 874. (2) Law Rep. 18 Eq. 338.

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In re EARL OF BERKELEY'S WILL.
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SIR G. MELLISH, L.J.:—

A tenant for life is not in general a trustee for the persons entitled in remainder as to any improvements he may make upon the estate, and he cannot, unless a special power is given him, charge against the estate any sums expended by him in making them. In my opinion, the *Lands Clauses Act* does give the tenant for life a power to charge against the estate the costs, charges, and expenses properly incurred by him in carrying out the duty imposed upon him by the Act. But it is, in my opinion, impossible to extend that power to the costs of opposing the bill in Parliament. If his opposition had been entirely successful, and the bill had been rejected, he certainly would have been unable to get his costs out of the estate, and it can hardly be that he should be able to do so when his opposition has only been partially successful.

Solicitors: Messrs. *Horn & Murray.*

Ex parte FOSTER. *In re* POOLEY.

L. JJ.
1874
Nov. 13, 14.

Bankruptcy—Adjudication—Composition—Bankruptcy Act, 1869, *ss.* 28, 125, 126—*Bankruptcy Rules*, 1870, *r.* 266.

F. filed a petition for adjudication against *P.*, who shortly afterwards filed a petition for liquidation by arrangement or composition. Before any meeting of creditors had been held, an adjudication was made by consent on *F.'s* petition, with a stay of proceedings under it till a certain day, before which the creditors duly passed resolutions for accepting a composition, which were afterwards duly registered. Orders had been made, by which the proceedings under the adjudication were from time to time stayed until after the registration:—

Held, that Rule 266 of the *Bankruptcy Rules*, 1870, applies to a case where the petition for adjudication precedes the liquidation petition; that the order for the adjudication must be regarded as made under that rule; and that, resolutions for accepting a composition having been duly registered, the adjudication ought to be annulled.

THIS was an appeal from an order of Mr. Registrar *Pepys*, annulling an adjudication.

On the 14th of January, 1874, Sir *W. Foster* presented a petition

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for adjudication against *Pooley*. On the 27th of February, 1874, *Pooley* presented a petition for liquidation of his affairs by arrangement or composition.

On the 4th of March an order of adjudication was made by consent against *Pooley* on Sir *W. Foster's* petition; with a stay of all proceedings under the adjudication till after the 16th of March.

On the 16th of March the first meeting of creditors under the petition for liquidation was held, and the requisite statutory majority passed a resolution for accepting a composition of 19*s.* 11*d.* in the pound, payable by instalments of 10*s.* in twelve months, 5*s.* more in eighteen months, and the remaining 4*s.* 11*d.* in twenty-four months. This resolution was duly confirmed at a subsequent meeting on the 27th of March, and the resolutions were registered on the 8th of May.

The stay of proceedings under the adjudication was from time to time continued until the 20th of May, 1874, on which day the Registrar made an order for staying such proceedings altogether.

Pooley afterwards applied to have the adjudication annulled; and on the 24th of July Mr. Registrar *Pepys* made an order accordingly, on payment by the bankrupt of the costs of the petitioning creditor and of the interim trustee.

Sir *W. Foster* appealed from this order.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the Appellant:—

The order for annulling the adjudication cannot have been made under sect. 28 of the *Bankruptcy Act*, 1869, for the provisions of that section were in no way complied with; and that is the only section under which it could be made after adjudication. Sects. 125 and 126 of the Act were not intended to apply to persons who had been adjudged bankrupt. There can be no valid resolution for liquidation under those sections after adjudication, the bankrupt's *status* having been changed, so that he has nothing to propose to his creditors.

Mr. *Roxburgh*, Q.C., and Mr. *Finlay Knight*, for the Respondent:—

The 28th section only applies where a trustee in bankruptcy

has been appointed. The adjudication here is to be referred to Rule 266 of the *Bankruptcy Rules*, 1870. The bankruptcy proceedings were superseded by the requisite majority of creditors, and the Court, under sect. 80, sub-sect. 10, suspended the proceedings. After this the Court had no option but to annul the adjudication.

Mr. *De Gex*, in reply :—

I contend that Rule 266 only applies to an ancillary adjudication, made under proceedings for liquidation, not to an adjudication or proceedings in bankruptcy taken by a creditor.

SIR W. M. JAMES, L.J. :—

Now that the case has been fully investigated, I am satisfied that the Registrar was right, and that the adjudication under the particular circumstances of the case was properly annulled. Had the adjudication been a simple adjudication in bankruptcy, made without any reference to the proceedings for liquidation, it could only have been got rid of under sect. 28, and with the sanction of the Court. But the adjudication was not a simple adjudication of that kind. We cannot for the present purpose look at the previous conduct of the bankrupt, or at the peculiar form of the composition, or any circumstances of that kind; the requisite majority of creditors having duly sanctioned the composition, we must look at the case as if the composition had been a most reasonable one. A petition for adjudication was presented founded on an act of bankruptcy; a petition for liquidation was presented in order to avoid bankruptcy, and both proceedings were pending. No adjudication having been actually made, the Registrar had jurisdiction under sect. 80, sub-sect. 10, to stay the proceedings in bankruptcy. It was also competent to him to proceed under Rule 266, and we must take it that he did proceed under that rule. The petitioning creditor was anxious to obtain an adjudication. It was alleged on the other side that proceedings for liquidation were pending. Instead of staying proceedings in bankruptcy till the proceedings for liquidation were disposed of, an adjudication by consent was granted, with a stay of proceedings under it till a future day.

L. JJ.
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FOSTER.
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POOLEY.

The object evidently was to grant an adjudication for the protection of the property, staying proceedings under it till it was seen what would be done under the proceedings for liquidation. Several further orders were made for staying proceedings, and they were thus stayed till the resolutions for a composition had been passed and registered. That being so, the proceedings must be referred to Rule 266, and that rule is imperative that after the resolutions have been duly passed, the adjudication shall be forthwith annulled. An adjudication is now no longer necessary, and cannot stand together with a binding resolution for a composition. If all the debtor's property is vested in a trustee, how can the debtor pay the composition. If there is any ground for rescinding the resolution, proper proceedings may be taken for that purpose, but we can only treat it as valid. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is important that the practice and the powers of the Court where proceedings in bankruptcy and liquidation are going on together should be defined. Proceedings in bankruptcy can only be commenced by a creditor, proceedings in liquidation by the debtor; and it would be very inconvenient if, when the petition for adjudication comes first, the opinion of the creditors could not be taken whether they would not prefer liquidation, as they generally do. The provisions applicable to the case are sect. 80, sub-sect. 10, of the Act, and Rule 266 of the *Bankruptcy Rules*, 1870. It is argued that sect. 80, sub-sect. 10, allows the proceedings in bankruptcy to be stayed at any time if proceedings for liquidation are taken. As at present advised I do not think this the true construction of that enactment. I think that it would be very inconvenient if a debtor, after adjudication and the appointment of a trustee, were to be allowed at any time to put his creditors to expense by proceedings for liquidation. After adjudication, when no other proceedings are pending, I think that the case falls within sect. 28, which provides a mode by which the bankruptcy may be changed to liquidation or composition with the consent of the creditors. It appears to me that sect. 80, sub-sect. 10, was intended to provide for the case where proceedings in bank-

ruptcy and for liquidation are pending at the same time, and I doubt whether, under that section, standing alone, the Registrar could adjudicate the debtor bankrupt, and stay the proceedings under the adjudication. It appears to me that he might either stay the proceedings in bankruptcy, and so reserve the question whether there should be an adjudication, or adjudicate at once, in which case the proceedings for liquidation would come to an end. Rule 266, however, comes in, and gives him the power of granting adjudication and staying the proceedings under it. It was argued that this does not apply where the petition in bankruptcy comes first, but that view seems to me very narrow. The object of presenting a petition for liquidation may be merely to gain time, and then Rule 266 furnishes the best remedy. The facts of the present case are such that the Registrar probably would have made without consent the order which he has actually made by consent. Whether that would have been the right course or not, I cannot construe the Appellant's consent as being anything but a consent to the Registrar's granting adjudication, and staying proceedings under it. Now, staying proceedings would have been idle if Sir *W. Foster* was to have it in his power to throw the estate into bankruptcy after the creditors had passed resolutions. The stay of proceedings must have been directed on purpose that if valid resolutions were come to by the creditors, the bankruptcy might be superseded. I am, therefore, of opinion that the order of the Registrar is correct.

Solicitors: Messrs. *Taylor & Jaquet;* Messrs. *Sharpe, Parkers, & Co.*

L. C. and L. JJ.
1874
Nov. 18.

SAULL *v.* BROWNE.

[1872 S. 237.]

Jurisdiction—Injunction—Criminal Proceedings.

6 Ch D. 466

Unless the cases raised and the objects sought are identical the Court will not prevent a Plaintiff in this Court from proceeding in a criminal Court against the Defendants to the suit in this Court.

Mayor of York v. *Pilkington* (1) commented on.

Decision of the Master of the Rolls affirmed.

SARAH SAULL, the executrix of *Thomas Saull*, filed the bill in this suit against her co-executor, *William Saull*, and *Browne* and *Godfrey*, two other persons who were partners with the executors in a wine and spirit business. The bill alleged divers acts of misconduct on the part of *Browne* and *Godfrey*, and that, acting in collusion, they had formed a scheme for transferring the business so as to injure the Plaintiff; and the bill prayed for a sale of the partnership property, and for accounts, and for payment of all profits made, and compensation for losses occasioned by the removal of the business to another place of business. The Defendants answered in January, 1873.

On the 13th of November, 1874, *Sarah Saull* obtained from the Police Court at *Worship Street* a summons against *Browne* and *Godfrey*, for unlawfully conspiring to defraud her of her just share in the partnership business.

An application was then made to the Master of the Rolls on behalf of *Browne* and *Godfrey* for leave to give short notice of motion to restrain the proceedings on the summons; but the Master of the Rolls thought he should have no jurisdiction to make the order, and refused leave.

The motion was now, by leave, made before the Court of Appeal.

Mr. *Fry*, Q.C., and Mr. *Ince*, in support of the motion:—

The charge before the magistrates is exactly the same as that raised by the bill, and the Court will not allow a Defendant to

(1) 2 Atk. 302.

be doubly harassed. *Mayor of York* v. *Pilkington* (1) is a clear authority, and that case is referred to in *Lord Montague* v. *Dudman* (2) and *Attorney-General* v. *Cleaver* (3). It will be very inconvenient to have the question now before the Court raised and decided in another Court.

Mr. *Fischer*, Q.C., and Mr. *Locock Webb*, for the Plaintiff, were not called upon.

LORD CAIRNS, L.C. :—

I should be unwilling to express any doubt that there may be cases in which criminal proceedings instituted by a party to a suit in this Court are so identical with the civil proceedings as to induce this Court to order that the same person shall not at the same time pursue his remedy in this Court and pursue another remedy which ranges itself under the head of criminal jurisdiction. No doubt there may be such a case, and the authorities which have been referred to, when properly understood, entirely come under the description which I have given.

In the present case the bill was filed by a Plaintiff alleging various matters as to a partnership with the Defendants, and asking for the interference of the Court for the protection of the property of the partnership. I make no observation as to the prospects of success in this suit: with that I have now nothing to do, and as to that of course I know nothing. But I find that the same Plaintiff has taken out a summons before a police magistrate against the Defendants, or some of them, alleging that they have entered into a conspiracy, and in the course of it have injured the Plaintiff as to the partnership property. That summons is based entirely upon criminal proceedings, and the object is to obtain the punishment of the persons charged with the conspiracy. It appears to me that the thing which is sought by this summons is different from anything which could be obtained in this Court. No doubt the criminal Court may have to consider the question of property, but the object of the summons is not to obtain relief

(1) 2 Atk. 302.
(2) 2 Ves. Sen. 396.
(3) 18 Ves. 211, 220; Madd. Ch. Pr. 3rd Ed. p. 235.

L. C. and L. JJ. 1874 SAULL v. BROWNE.

as to the property, but to obtain punishment for the Defendants in their persons.

We put it to the Defendants' counsel whether, if before the suit was commenced a summons of this kind had been taken out, this Court could interfere with the proceedings, and it was admitted that the Court could not interfere. So also it cannot be doubted that, after relief has been given by this Court in this suit, a criminal Court might be applied to, and the punishment of the Defendants might be obtained. If, then, such proceedings might be taken either before or after the suit, it is difficult to see why they should not be taken at the same time and concurrently with the suit. There is no inconsistency in allowing both proceedings, as nothing which takes place on the summons can be evidence in the suit.

It would be in the discretion of the magistrate whether to hear the case or not; but that is for his discretion, not for ours. Or, if the summons should result in an indictment, it will be for the Attorney-General to consider whether such a proceeding ought to be allowed to go on; but that, again, rests in his discretion, not in ours.

There is no authority for us to make such an order, and the motion must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. In old times this Court might well have been asked to interfere with criminal proceedings taken against an officer of the Court for the purpose of harassing him, as he had no other sufficient protection. There is an old decision, referred to in the note to *Francklyn* v. *Colhoun* (1), that resisting and killing a sequestrator was not murder. At that time, therefore, the Court had cause to interfere with criminal proceedings, but the cause for so doing has now ceased. The authority produced to us, *Mayor of York* v. *Pilkington* (2), is, as far as I know, the only case in which this Court has made such an order as we are now asked to make; and even that case is not exactly similar, because it appears that the same right would there have been tried in both Courts.

(1) 3 Sw. 276, 280, n. (2) 2 Atk. 302.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The power of this Court to interfere with a criminal proceeding can only arise when the criminal proceeding is of the same nature as the civil proceeding. The only case cited was of that nature, but here the proceedings are quite different, and this Court is not called upon to interfere.

Solicitors for the Defendants: Messrs. *Howard & Co.*
Solicitors for the Plaintiff: Messrs. *Miller & Miller.*

L. JJ.
1874
Nov. 16.

In re MORRIS'S ESTATE.
MORRIS *v.* MORRIS.

[1872 M. 232.]

Retainer by Executor—Debt not yet ascertained—Partnership Accounts.

A testator, who was a member of a partnership firm, appointed one of his surviving copartners and another person his executors:—

Held (affirming the decision of *Hall*, V.C.), that the surviving partner was not deprived of his right to retain assets in his hands in satisfaction of the liability of the testator to the firm, by the fact that the amount of the liability had not been ascertained, no accounts of the partnership having been taken.

THIS was an appeal from a decision of Vice-Chancellor *Hall*.

The testator, *Thomas Arthur Morris*, whose estate was being administered in the suit on an administration summons, was, during his life, in partnership with his brothers, the Plaintiff *Richard Morris* and the Defendant *George William Morris*, in two distinct firms, which carried on business at *Doncaster* under the style of *Morris Brothers*, and at *Mogador*, in *Africa*, under the style of *R. Morris & Co.*

The testator died on the 13th of October, 1871, having by his will appointed his brother *George William Morris* and *J. D. Holmes* his executors.

At the time of his death the testator's estate was insolvent. His assets consisted of the sum of £964 1*s.* 2*d.*, which was due to him from the *Doncaster* firm, and the sum of £710 19*s.* 1*d.*, which remained in the hands of the executors after payment of expenses. The surviving partners filed an affidavit stating that it appeared from the books of the *Mogador* firm that the testator's share of the liabilities of that firm amounted to £3105 2*s.* 4*d.* The Defendant, *G. W. Morris*, claimed to set off the sum of £964 1*s.* 2*d.* owed by the *Doncaster* firm to the testator against the debt due from him to the *Mogador* firm, which was conceded by all parties, the two firms being composed of the same partners. The Defendant also claimed to retain, according to his legal right as executor, the sum of £710 19*s.* 1*d.*, in part payment of the balance owed by the testator to the *Mogador* firm, of which the Defendant was one of the surviving partners. This claim was adjourned into Court

from Chambers, and the Chief Clerk at the same time certified that if the claim should be held good it would not be to the advantage of the testator's estate to investigate further the accounts of the two partnerships, which would be very voluminous.

The legal question was accordingly argued on the assumption that, whatever the result of taking the accounts might be, the debt due from the testator's estate would be much larger than £710 19*s.* 1*d.* The Vice-Chancellor made an order that the Defendant, *G. W. Morris*, was entitled as executor to retain the sum of £710 19*s.* 1*d.*, and also any further portion of the testator's outstanding estate which the Defendant might receive, in part satisfaction of the debt of £3105 3*s.* 4*d.* mentioned in the Chief Clerk's certificate to be the testator's share of the liabilities of the firm of *R. Morris & Co.*, and declared that the accounts of neither of the partnerships ought to be taken.

From this decision *H. Robinson*, a creditor of the testator to the amount of £314, appealed, by special leave of the Court.

Mr. *W. Pearson*, Q.C., and Mr. *Bardswell*, for the Appellant:—

The right of retainer by an executor is a strictly legal right; and is only co-extensive with the right of payment. If the debt is not ascertained, and not at once payable, there is no right of retainer. In the present case, the debt is not only unascertained, but is incapable of being ascertained in a Court of Law. A Court of Law cannot take the accounts of a partnership, and therefore will not allow the right of retainer against a liability which depends on the result of partnership accounts: *De Tastet* v. *Shaw* (1). The Courts of Equity do not favour the right, and will not allow it where it would not be allowed at law: *Williams* on Executors (2); *Chapman* v. *Turner* (3). At all events, the Court has no power to determine the question until the accounts have been taken. It may turn out that, as between the partners, there is nothing due from the testator's estate.

Mr. *Lindley*, Q.C., and Mr. *Bury*, for the executor:—

It was assumed by all parties before the Vice-Chancellor that whatever the result of the accounts might be, there would be a balance due from the estate of the testator far exceeding the sum

(1) 1 B. & A. 664. (2) 6th Ed. p. 971. (3) 11 Vin. Abr. D. 2, pl. 2.

L. JJ. 1874 — *In re* MORRIS'S ESTATE. — MORRIS *v.* MORRIS.

of £710; and it was therefore useless to take the accounts before determining the question of law. The right of retainer is not strictly confined to legal debts. The Courts of Law admit the right of retainer for equitable debts, such as debts due to a trustee for the executor, and the right is also admitted in equity: *Cockroft* v. *Black* (1). The right of retainer in respect of the result of a partnership account is not denied in *De Tastet* v. *Shaw* (2); but the Court of Law having no machinery to ascertain the debt, could not give effect to the right. That is no reason why it should not be enforced in equity where the accounts may be taken. It is no objection to the right of retainer that the debt is a complicated one, or that the debt is only due to one of the executors: *Kent* v. *Pickering* (3).

Mr. *Karslake*, Q.C., and Mr. ~~*Bury*~~, for the Plaintiff.

Mr. *W. Pearson*, in reply.

SIR W. W. JAMES, L.J.:—

I am of opinion that the decision of Vice-Chancellor *Hall* is perfectly right.

There are two questions before us which have been raised by the Appellant, and the Appellant's argument consists, to a great extent, in mixing those two questions together.

As I understand it, there were two questions before the Vice-Chancellor. The first was the point of law which was argued before him on the assumption that there was a debt, and which has also been the main question argued before us, namely, that a surviving partner who is an executor has a right of retainer in respect of a balance to be ascertained in Chambers upon taking the partnership accounts. The amount cannot be ascertained till the accounts are taken, but assuming that there is a debt, and that the amount of the debt will be ascertained on taking the partnership accounts, does the right of retainer exist, or will it exist when that debt is ascertained? The Vice-Chancellor was of opinion, and I concur, that there was no distinction for the purpose of retainer between a debt which required accounts to be taken and any other debt which might be the subject of proof by

(1) 2 P. Wms. 298. (2) 1 B. & A. 664. (3) 2 Keen, 1.

the executors—that the mere complication of the details from which the amount of the debt was to be ascertained could not affect the principle. But then it is said that this was as between the partners an equitable debt (although I am not quite sure whether it is not a legal debt also); that it is a debt which could not be ascertained at law, but only in equity; and, therefore, that a Court of Law would not allow it to be the subject of retainer, and consequently, a Court of Equity would not allow it to be the subject of retainer. The general principle has been referred to in support of that doctrine, that a Court of Equity only gives the right of retainer where the Court of Law gives it. That doctrine has been the subject of qualification and modification, as it appears to me, arising out of the justice of the case. An equitable debt has been allowed to be retained in this Court; Courts of Law have followed that, and allowed equitable debts to be retained at law.

Then there came the question of debt, which could only be ascertained through the machinery of a Court of Equity, as in *De Tastet* v. *Shaw* (1). In that case the Court of Law in effect said, "The plea tenders an issue which is incapable of being tried in this Court, for this Court is unable to ascertain the amount of debt; therefore, we are powerless." That would seem to me necessarily to lead to a reference to this Court to supply that defect. The executor's right of retainer being a right in respect of the thing itself, which is the debt, and that right being incapable of being exercised through defect of machinery in the Court of Law, we are asked to say that we will refuse our machinery to supply that defect.

I am of opinion that such a course would be really a monstrous violation of common sense and common justice. I agree with Vice-Chancellor *Hall*, that the decision in *De Tastet* v. *Shaw* was a mere statement of the Court's inability to do the justice which the case required, and therefore it became, as a matter of machinery, necessary to resort to this Court to do it. That being so, the right must be exactly the same, as it seems to me, whether it is a complicated or a simple right of retainer, and the executor cannot be allowed to lose the right because this Court is the only Court in which the amount can be properly and effectually ascertained. That was the legal principle, as I understand, which the

(1) 1 B. & A. 664.

L. JJ. 1874 *In re* MORRIS'S ESTATE. MORRIS *v.* MORRIS.

parties desired to have settled by the Court, in order that they might know whether it was worth their while to go on with any further expense to an estate where the assets are very small compared with the amount of legal debts and liabilities. I think that was a very convenient course, because it would be monstrous that these parties should be allowed to go on taking the accounts at an immense expense, and then have the question of law determined after the accounts had been taken upon further consideration, when great part of the assets had been exhausted.

Then arose the second point, which to my mind is wholly disconnected from the first, namely, that the executor has not averred a debt in his affidavit, but has only averred a liability which may or may not ripen into a debt, because all the liabilities of the partnership may have been paid by the surviving partners. Nobody ever suggested anything of the kind until it was ingeniously raised by Mr. *Pearson* in his argument before us. The point was never discussed—no evidence was ever required—no question was ever put to the Vice-Chancellor, and the Chief Clerk's certificate, which is now binding upon the parties, has found it is not worth while to incur any further expense on these accounts, because nothing can result from it for the benefit of anybody.

Therefore, the first point being a mere question of law upon the right of retainer on the part of the executor, and it being decided, as the Vice-Chancellor has decided it, it appears to me he was quite right, and the Chief Clerk was right, and the parties were quite right, in not incurring useless expense in inquiring what the amount of the debt was into which the liability would ripen, and would only ripen when the account was taken.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

With reference to the point of law, which, I think, is really the only question that has been seriously argued before us, it is quite clear that there is a right of retainer at law for all legal debts; and the right of retainer is not confined to them, but the right of retainer at law extends also to equitable debts when the equitable debts can be ascertained at law.

Then with respect to the legal debts, it is wholly immaterial that it is required to take a complicated account before you can

ascertain what the amount of the debt is. No doubt, in respect of partnership accounts, a distinction has been made between partnership accounts and other accounts, because the partnership accounts cannot be taken at law; and that being so, it was decided, in the case of *De Tastet* v. *Shaw* (1), that an executor cannot retain a debt if it involves the taking of the partnership account for the purpose of ascertaining whether there is a debt or not.

Then the question that really arises before us is, Would it be at all rational or right to hold that, although there may be a right of retainer by an executor, not only for a legal debt, whether it requires a complicated account or not, but also for an equitable debt, yet if the equitable debt requires the taking of partnership accounts, then there should be no right of retainer? It appears to me that that would be a very absurd distinction, and that we ought not to sanction it.

I am of opinion that the Vice-Chancellor has decided the point correctly.

Solicitors for the Appellant: Messrs. *Scott & Co.*
Solicitor for the Respondents: Mr. *W. H. Lammin.*

In re WILKINSON (A LUNATIC).

Lunacy—Stop-order by Assignee of one of the Next of Kin.

The Court will not make an order in the nature of a stop-order on the estate of a lunatic in favour of an assignee of the next of kin.
In re Pigott (2) overruled.

THE lunatic in this case was found to be of unsound mind by inquisition on the 16th of February, 1868, and committees of her person and estate were appointed. Her property consisted of about £10,790 in the public funds, which were transferred into Court in the lunacy. She had five brothers and a sister, who were her sole next of kin.

On the 11th of November, 1874, *J. F. Williams,* one of the next of kin, and three of his children, assigned to *William Baker*

(1) 1 B. & A. 664. (2) 3 Mac. & G. 268.

L. JJ. 1874 *In re* WILKINSON (A LUNATIC).

all the sixth part or other share to which *J. F. Williams* was or would be entitled on the death of the lunatic, for securing the repayment of a sum of £400.

The parties to the deed now presented a Petition in the lunacy, praying that no part of the funds in Court or the interest thereof might be transferred or paid to any persons claiming in right of or under the assignors without notice to *W. Baker*.

Mr. *Batten*, for the Petitioners, referred to *In re Pigott* (1), where a similar order was made by Lord *Truro*. In a previous case, *In re Moore* (2), a stop-order in more general terms had been granted by Lord *Cottenham*, but the form of the order now asked for was approved by Lord *Truro*.

Mr. *Knox*, for the committees, opposed the Petition. It was against the practice of the Court to make any order during the life of a lunatic interfering with the administration of his estate after his death.

SIR W. M. JAMES, L.J.:—

I think the order in *In re Pigott* was made *per incuriam*. According to the present practice in Lunacy no such order is ever made or will be made. The Petition must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *E. H. Barlee*; Messrs. *Park Nelson & Morgan*.

(1) 3 Mac. & G. 268. (2) 1 Mac. & G. 103.

In re C—— (AN ALLEGED LUNATIC).

L. JJ.
1874
Nov. 23.

Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *s.* 11—*Inquiry based upon Report of Commissioners—Order for Costs out of alleged Lunatic's Estate.*

Where an inquiry as to the lunacy of a supposed lunatic had been based upon the report of the Commissioners in Lunacy, and had resulted in his being declared of sound mind, the Court ordered the costs of the proceedings in lunacy and of the inquiry to be paid out of the supposed lunatic's estate.

IN March, 1873, Mr. *C.* was admitted as a person of unsound mind into the *Worcester County Lunatic Asylum* under the order of two justices. In pursuance of a report of the Commissioners of Lunacy, dated the 23rd of May, 1874, finding that his property was not duly protected, an inquiry was directed on the 11th of July, 1874, as to his state of mind, which, on the demand of Mr. *C.*, was had before a jury. The jury returned a verdict that Mr. *C.* was of sound mind and capable of managing his own affairs.

A petition was now presented by the Official Solicitor of the Court of Chancery, praying that Mr. *C.* might be ordered to pay the costs of the said proceedings in lunacy and of the said inquiry. The petition was served upon Mr. *C.*, but he did not appear.

Mr. *Leigh Pemberton*, for the Petitioner, referred to the 11th section of the *Lunacy Regulation Act*, 1862 (1), and to *Re F*—— (2).

(1) 25 & 26 Vict. c. 86, s. 11: It shall be lawful for the Lord Chancellor, intrusted as aforesaid, to order the costs, charges, and expenses of and incidental to the presentation of any petition for a commission in the nature of a writ *de lunatico inquirendo*, or for any order of inquiry under the *Lunacy Regulation Act*, 1853, and of and incidental to the prosecution of any inquiry, inquisition, issue, traverse, or other proceeding consequent upon such commission or order, to be paid either by the party or parties who shall have presented such petition, or by the party or parties opposing such petition, or out of the estate of the alleged lunatic, or partly in one way and partly in another, as the Lord Chancellor, intrusted as aforesaid shall in each case think proper; and such order shall have the same force and effect as orders for the payment of money made by the High Court of Chancery in cases within its jurisdiction.

(2) 33 L. J. (Ch.) 333.

L. JJ. 1874 *In re* C—— (AN ALLEGED LUNATIC).

SIR W. M. JAMES, L.J.:—

The order must be for payment of the costs out of the estate of the alleged lunatic, as directed by the Act; but I give no opinion as to the manner in which it can be enforced.

SIR G. MELLISH, L.J., concurred.

The order as drawn up was—

Let the costs, charges, and expenses incurred by the official solicitor of and incidental to the report of the Commissioner in Lunacy, dated the 23rd May, 1874, as to the unsoundness of mind of the said *C*——, and of the order of the 11th of July, 1874, for inquiry concerning his lunacy, and of and incidental to the prosecution of the said inquiry, and this application, be paid by the said *C*—— out of his estate; and let such costs, &c., be taxed, &c.

Solicitors: Messrs. *Meynell & Pemberton.*

L. JJ. 1874 *Nov.* 23.

EVANS *v.* BEAR.

[1870 E. 54.]

Attachment—Defaulting Trustee—Possession or Control—Debtors Act, 1869, s. 4, *Exception* 3.

Post 662. 3 C.L.D. 318, 320.

In order to bring a trustee within the 3rd exception of sect. 4 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), it is not necessary that the money should have been in his sole possession or under his sole control. Therefore, where a sum of money, forming part of the assets of a testator's estate, was paid into a bank to the joint account of two executors, with power to one of them to draw cheques, and he drew out the money and misapplied it, and an order was made against both executors for payment of the money into Court:—

Held (affirming the decision of the Master of the Rolls), that the other executor was within the exception, and that a writ of attachment might be issued against him for non-payment of the money.

A writ of attachment for non-payment of money is a matter of right, and the Court has no discretion to refuse it.

THIS was an appeal from a decision of the Master of the Rolls.

The bill was filed by a residuary legatee under the will of *Thomas Sutton* against his surviving executor, *John Bear*, and the per-

sonal representative of a deceased executor, *William Drake*, for the administration of the estate, and charging the executors with breach of trust, by which some of the trust funds had been lost.

The testator died in 1852.

W. Drake was a solicitor, and acted almost exclusively in the administration of the estate. *J. Bear* was a village schoolmaster, of advanced age; he took very little part in the administration except by joining in receipts.

W. Drake misappropriated a considerable sum of money, and died in December, 1866.

The Chief Clerk's certificate found, among other things, that the executors had jointly and severally received a sum of £4670, being the proceeds of the sale of certain real estate of the testator; and that, after deducting the payments which they had made, there was a balance due from them of £2203.

By the order on further consideration, *J. Bear* and the estate of *W. Drake* were declared jointly and severally liable to pay the said sum of £2203, and *J. Bear* and the administrator of *W. Drake* were ordered to pay the money into Court by a day therein named.

The money not having been paid at the appointed time, the Plaintiff moved for an attachment against *Bear*.

It appeared from the affidavits filed by *Bear* that he had himself received no part of the money which had been lost; that the purchase-money for the estate had been paid into the *Dereham Bank* to the joint account of the two executors, and had been drawn out by *W. Drake*, under an authority to the bank to honour his cheques. He also swore that he was unable to pay the money, and had no property except a small life annuity.

It was also in evidence that *Bear* was upwards of seventy-five years of age, and exceedingly infirm and in a bad state of health, and that an arrest would endanger his life.

The Master of the Rolls held that *Bear* was not protected by the *Debtors Act*, and that the Court had no discretion to prevent the writ from issuing. From this decision *Bear* appealed, the writ having been suspended by the Lords Justices in the meantime.

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Mr. *Cozens-Hardy*, for the Appellant:—

First: this is not a case within the exceptions in the *Debtors Act*, 1869, and *Bear* is therefore protected from arrest. The only exception bearing on the case is the 3rd exception mentioned in sect. 4, namely, "Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." The money never was in *Bear's* possession or under his control, for it was in the joint possession of himself and his co-executor. At all events, he never had any benefit from it, and was guilty of no moral delinquency: *Middleton* v. *Chichester* (1).

Secondly: the issuing of the writ is in the discretion of the Court. The issuing of the attachment was a matter of course before the Act, because without it no writ of sequestration could be obtained. Now, under the 8th section, a sequestration can be obtained at once. A motion for committal to prison under the 5th section of the Act is discretionary: Order in Chancery under *Debtors Act*, 1869, rr. 9, 10, 11 (2); and there is no reason why an attachment should be on a different footing. This is a very hard case, and no good can result from the attachment, and it will in all probability result in the death of the Defendant.

Mr. *Ellis*, for the Plaintiff.

SIR W. M. JAMES, L.J.:—

I am very sorry that we must hold that the Master of the Rolls was right. It is quite clear that the 3rd exception in the *Debtors Act* applies. The two executors have been declared severally as well as jointly liable for the money; that being so, we have no discretion. The case is entirely taken out of the *Debtors Act*, and the old law and practice are applicable. The appeal must be dismissed, but without costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellant: Messrs. *Sole, Turner, & Knight.*

Solicitor for the Respondent: Mr. *J. Lott*, agent for Messrs. *Darvill & Co., Windsor.*

(1) Law Rep. 6 Ch. 152. (2) See Law Rep. 5 Ch. xxxiii.

In re MARY SMITH (A LUNATIC).

L. JJ.
1874
Nov. 23.

Conversion—Lunatic's Estate—Sale of Real Estate—Lease of Minerals for a gross Sum—Tenant in Common—Subsequent Confirmation by the Court—Lunacy Regulation Act, 1853 (17 & 18 *Vict. c.* 70), *ss.* 124, 130, 131.

A., *B.*, and *C.* were tenants in common in fee of land. *C.* became of unsound mind. *A.* and *B.* sold part of the land, and conveyed their shares to a purchaser. They also granted a lease of the minerals under other parts, and demised their shares to the lessee, in consideration of a gross sum of money payable by instalments, called in the lease rent, within a limited time. In both deeds they covenanted that *C.* should concur, and that they would hold her share of the moneys payable in trust for her.

B. afterwards became also of unsound mind, and *A.* sold other parts of the land, and granted leases of minerals under other parts for a like consideration, covenanting in like manner that *B.* and *C.* should concur, and that he would hold their shares of the moneys payable in trust for them. *B.* and *C.* were both found lunatic by inquisition; and the Court confirmed the sales and leases, and ordered the committee to execute the deeds.

C. died, leaving *B.* her heir-at-law and sole next of kin. Afterwards *B.* died also:—

Held, that the leases were in the nature of absolute sales of portions of the real estate; that the confirmation of the sales and leases were sales under the 124th section of the *Lunacy Regulation Act*, 1853; and that as between the real and personal representatives of *B.* the proceeds both of the sales and the leases effected after *B.* became of unsound mind belonged to her heir-at-law as real estate.

But *held*, that as to the shares both of *B.* and *C.* in the proceeds of the sale and lease in which *B.* concurred, they were converted into personalty, and belonged to *B.*'s next of kin.

IN this case petitions were presented by the heir-at-law, and by the legal personal representative of *Mary Smith*, a lunatic, deceased, raising the question whether certain parts of her property were real or personal estate.

George Smith, the father of the lunatic, by his will dated the 21st of March, 1831, gave his residuary real and personal estate to his son and daughters, *Samuel Smith*, *Martha Smith*, *Mary Smith*, and *Sarah Smith*, their heirs, executors, administrators, and assigns, respectively, as tenants in common.

The testator died shortly after the date of his will.

Previously to the year 1853, *Martha Smith* became of unsound mind, but was not so found by inquisition. By an indenture dated

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the 13th of January, 1853, in consideration of £1500 paid to *Samuel, Mary,* and *Sarah*—as to three-fourths for their own use, and as to one-fourth in trust for *Martha—Samuel, Mary,* and *Sarah* demised certain portions of the real estate, with power to work the entirety of the mines, to Messrs. *Hickman,* for thirty-one years, reserving a mining rent of £487 10*s.* every half-year, until the 24th of June, 1861, and upon the 25th of December, 1861, £450, after which no further rent was reserved, with a proviso that they should hold one-fourth part of the moneys so paid for the security of themselves in respect of the covenants entered into by them for the ultimate confirmation of the demise by *Martha,* and for quiet enjoyment in the meantime, and subject thereto in trust for *Martha.*

On the 13th of October, 1853, *Samuel, Mary,* and *Sarah* sold certain other parts of the real estates, and the mines under them. By the deed of conveyance they conveyed their undivided three-fourths to the purchaser, and covenanted that *Martha* should convey her share, and that they would stand possessed of one-fourth of the purchase-money in trust for her.

On the 8th of December, 1854, *Mary* having then also become of unsound mind, although not so found by inquisition, *Samuel* and *Sarah* sold another portion of the real estate, with the mines under it. By the deed of conveyance they conveyed their two undivided fourth parts to the purchasers, and covenanted that *Martha* and *Mary* should convey their shares, and that *Samuel* and *Sarah* would hold two-fourths of the purchase-money in trust for them equally.

By an indenture dated the 8th of July, 1855, in consideration of £337 10*s.* then paid to *Samuel* and *Sarah,* as to two-fourths thereof for their own use, and as to two-fourths in trust for *Martha* and *Mary,* and in consideration of £1600 6*s.* 3*d.* to be paid to the same persons in the same manner, at the times thereinafter mentioned, *Samuel* and *Sarah* demised their two fourth shares in certain other parts of the real estates, and in the mines and minerals thereunder (with power to work the entirety of such mines and minerals) to *David Jones* for twenty-one years, reserving, by way of mining rents, upon every 25th of March and 29th of September, up to the 29th of September, 1859, £168 15*s.*, and £81 11*s.* 3*d.*

on the 25th of March, 1860, with a proviso that the two lessors should stand possessed of two-fourths of the moneys payable under the lease upon trust for the protection of the lessors against the covenants therein contained for the eventual demise of the shares of *Martha* and *Mary*, and for quiet enjoyment thereof in the meantime, and subject thereto upon trust for *Martha* and *Mary* equally.

Sarah Smith died on the 23rd of June, 1856, having by her will given all her real and personal estate to her brother and sisters, *Samuel*, *Martha*, and *Mary*, in equal shares.

On the 29th of August, 1856, the 27th of April, 1858, and the 17th of July, 1860, *Samuel Smith* sold and conveyed other small portions of the real estate in a similar way, covenanting to stand possessed of two-thirds of the purchase-money in trust for *Martha* and *Mary*.

By an indenture dated the 18th of May, 1860, *Samuel Smith* demised a further portion of the estates to *P. Roberts* and *E. Yardley* for the term of twelve years, with liberty to work the mines, paying a surface rent of £9 17*s.* 6*d.*, and the sum of £373 2*s.* 6*d.* on the execution of the indenture, and a further sum of £1650 by half-yearly instalments of £150 each; with a proviso that he should stand possessed of the two-thirds of the said several sums in trust for *Martha* and *Mary* equally.

Samuel Smith died on the 27th of September, 1861, having appointed *J. F. Adams* his executor.

In January, 1862, *Martha Smith* and *Mary Smith* were both found lunatic by inquisition. The same committee was appointed of both estates.

A bill was filed by the committee against *J. F. Adams* praying an account of all moneys received by *Samuel Smith* or his executor for the benefit of *Martha* and *Mary*, and for an inquiry whether it would be for the benefit of the lunatics to adopt and confirm the before-mentioned sales and leases.

This suit was compromised by two agreements, dated the 14th of November, 1866, by which it was agreed, among other things, subject to the sanction of the Court, that the several sales and leases should be confirmed, and that the Defendant should pay to the committee the sum of £5056 19*s.* for the proportion payable to

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Martha Smith of the moneys arising from the before-mentioned sales and leases, and a like sum for the proportion payable to *Mary Smith*.

Martha Smith died in February, 1867, intestate, leaving *Mary* her sole next of kin and heiress-at-law, and the committee of *Mary's* estate was appointed her administrator.

By an order of the Lords Justices, dated the 5th of August, 1867, and made both in the Chancery suit and in Lunacy, the Court ordered the compromise to be carried into effect, and that out of the two sums of £5056 19*s.* each, when paid to the committee, two sums of £2536 15*s.* 10*d.* each, which represented the shares of *Martha* and *Mary* in moneys arising from the sales of real estate should be carried to the "Real Estate Account" in the matter of the lunacy of *Mary Smith*, and two sums of £2503 2*s.* 10*d.* each, which represented the shares of *Martha* and *Mary* in moneys arising from the leases of the mines, should be carried to the "Mineral Account" in the same matter.

Mary Smith was now also dead. She left a will made before she became of unsound mind, and petitions were presented by her heir-at-law and the administrator with her will annexed, respectively claiming the two funds standing to the "Real Estate Account" and the "Mineral Account."

Mr. *J. Pearson*, Q.C., and Mr. *Everitt*, for the heir-at-law:—

We claim both the funds as real estate. First, as to the "Real Estate Account." It is composed principally of the proceeds of sales effected by *Samuel* and *Sarah*, or *Samuel* alone, after *Mary* became of unsound mind. It will not be contended that these sales could have any effect in changing the nature of the property independently of the proceedings in lunacy. The Court has no power to convert the real estate of a lunatic or an infant into personalty: *Steed* v. *Preece* (1). The order confirming the sales must have been made under the 124th section of the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), which gives power to the Court to direct the committee to sell or join in the sale or partition of the lunatic's land, but the Legislature was careful to

(1) Law Rep. 18 Eq. 192.

provide that the proceeds of such sale should be held in the manner directed by the 135th section—that is, as real estate.

Secondly, as to the proceeds of the minerals. These leases were not in the usual form of mining leases; there was no royalty or surface rent reserved; they were, in fact, sales of the minerals to be got within a certain time, in consideration of a gross sum, payable by instalments. The consideration money must, therefore, be treated as ordinary purchase-money. But if they are treated as leases the result will be the same, for the confirmation of the Court, if valid at all, must date back to the granting of the lease, and at that time the mines were not open. The Court must therefore have acted not under the 130th section, which relates to open mines, but under the 131st, which gives power to authorize leases of mines unopened, in which case it is expressly provided that the proceeds are to be held as real estate. The lunatic, if of sound mind, might have treated the lessee as a trespasser, and restrained him from working: *Hole* v. *Thomas* (1); *Arthur* v. *Lamb* (2); *Bailey* v. *Hobson* (3).

With respect to the dispositions of the property in which *Mary Smith* concurred, we admit that they operated as a conversion of her own share; but we contend that they did not affect the character of the share of *Martha*, which has subsequently devolved upon her as her heiress-at-law, and we claim the money representing that share as real estate.

[They also referred to *Henderson* v. *Eason* (4) and *Jacobs* v. *Seward* (5).]

Mr. *Ince*, for the legal personal representative:—

The sales have been treated by the other side as sales made by the Court under the authority of the *Lunacy Regulation Act*. But the Court had power to confirm sales independently of the Act. The confirmation operated not as a present sale but as ratifying a previous transaction, which the Court accepted with all its incidents. If it was under any of the sections of the Act, it was under the 122nd section, which empowers the Court to carry into

(1) 7 Ves. 589.
(2) 2 Dr. & Sm. 428.
(3) Law Rep. 5 Ch. 180.
(4) 17 Q. B. 701; 2 Ph. 308.
(5) Law Rep. 4 C. P. 328.

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effect contracts for sale of a lunatic's property. It is not correct to say that the Court never changes the nature of a lunatic's estate. It has always done so of its own inherent jurisdiction if it sees it to be for the benefit of the lunatic, and if for such a purpose it is found necessary to convert the estate, it is converted for all intents and purposes: *Ex parte Bromfield* (1); *Oxenden* v. *Lord Compton* (2).

Our claim is still stronger with regard to the proceeds of the minerals. Even assuming that the lessees might have been treated as trespassers, the Court held it for the benefit of the lunatic not so to treat them, but to ratify the leases, and merely to ask for an account. But by so doing it was assumed that the proceeds were personal estate, like the ordinary proceeds of a mining lease: *Bentley* v. *Bates* (3). The leases were not sales out-and-out, they were in a form not unusual in mining districts, and the payments were in the nature of rent, and belong to the personal estate.

With respect to the dispositions of the property in which the lunatic concurred, her heir-at-law is estopped from saying there was no conversion both as to her own and her sister's share.

Mr. *Eyre* appeared for the next of kin, but the Court held that he had no *locus standi*, and declined to hear him.

Sir W. M. James, L.J.:—

I am of opinion as to both the sums in question that the heir-at-law is entitled to them as real estate. I start with this principle, that this Court, whether we or our predecessors were sitting here, must be assumed and presumed to have acted rightly and lawfully, and not to have done anything that it could not rightfully and lawfully do. It had no power to deal with the lunatics' real estate except under the provisions of the Act of Parliament to which we have been referred. To a certain extent this Court can deal with real estate, with regard to timber, for instance, which was the subject of one of the cases referred to by Mr. *Ince*; that is, if in the due management of the estate it is necessary to cut down timber which is too old, or which it is desirable to cut

(1) 1 Ves. 453, 461. (2) 2 Ves. 69, 71.
(3) 4 Y. & C. Ex. 182.

down for the benefit of other timber, then that would be understood as done in the due management of the estate, like cutting a crop of hay. Of course in that case it is converted into a chattel, the value of which belongs to the personal estate. But to dispose of a piece of fee simple land, or to dispose of a whole wood upon the land, or the whole minerals under it, is in fact disposing of the lunatics' real estate in substance, and the Court must be assumed to have dealt with the lunatics' real estate under some statute authorizing them in that behalf.

Now how did it happen in this case that the thing was done? Persons of sound mind being tenants in common with persons of unsound mind deal with the property in such a way as that the whole property is entered upon by a stranger. That, no doubt, was either a trespass or a conversion of the property of persons of unsound mind, for which there was no legal defence, and which would entitle those persons to bring an action of trespass or trover, or file a bill for an account against their co-tenants in common. Such an action would have been a personal action. Instead of doing that, and disturbing the arrangement which was for the benefit of everybody, it was considered by this Court, confirming the report of the master, that it was better for the lunatics that the arrangement which had been made by the persons of sound mind should also be made on behalf of the lunatics, that is to say, it was considered by this Court desirable for the lunatics to concur with the persons of sound mind in selling the property which had been sold, receiving their share of the purchase-money. The fact that the arrangement had been already made and the conveyance executed by persons of sound mind cannot make any difference. The Court did approve of the committee of the lunatics concurring with the other persons in making a conveyance of the lunatics' shares, the lunatics receiving the proper proportion of the purchase-money. It can make no difference that there had been a suit in Chancery upon the subject as between the lunatics and the representatives of the persons of sound mind. That is only a part of the history of the case. Under those circumstances it was considered better to make the sale, and it was made accordingly. There can be no question whatever with respect to the proceeds of that which was sold in fee simple.

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Then it appears to me, when we consider what was done with regard to the mines, that there is substantially no difference between those dispositions and the others. They were not really leases of mines—not what in common parlance would be called leases of mines, nor such as this Court would ever make when granting leases of mines. The Court never takes a gross sum down, which would be in the nature of a premium or fine for granting a lease, leaving no rent hereafter. It was in fact in each case a right to take the minerals for a certain term of years upon the payment of a gross sum; not, indeed, a sum payable at once, but payable by instalments at periods which extended over some years. In fact there was left a term of years still remaining, during which the right of the lessee was to continue. He had no legal right under it. He might have been stopped by the lunatic tenant in common at any time, but there being the thing still to be worked, the property still ungot, and the one sum to be paid for it, the Court said: "We are of opinion it is for the interest of the lunatics to concur with the other tenants in common in making a conveyance or grant of the mines part of the real estate of the testator for a sum of money down." That sum of money so paid down is purchase-money for that interest, and to be dealt with exactly in the same way as the 135th section says fines and premiums are to be dealt with, and is as much real estate as the other sum, and both sums must be dealt with as real estate, and paid to the heir-at-law. That is, however, subject to this, that whatever *Mary*, the sister who was of sound mind, granted, or professed to grant, with regard either to her own or *Martha's* share, is bound by what *Mary* so did, and it was utterly impossible for her to dispute it afterwards when she survived and became heiress-at-law. The proceeds of *Martha's* share must be considered as personal estate. There will be no difficulty in ascertaining how much is due to that part which will go to the legal personal representative and the other part which will go to the heir-at-law.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears to me that we have really to discover which are the sections of the Act under which

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our predecessors acted when they confirmed the sale of the real estate and the leases of the mines.

With respect to the sale of the real estate, I am clearly of opinion they made that confirmation under the 124th section. By that section it is provided that when the lunatic is entitled to an undivided share of land, and it appears to the Court expedient that the sale of the land should be made, the Court may concur on behalf of the lunatic with the other tenants in common in making a sale. It appears to me that is what the Court did in this case. It is true that the tenants in common made the sale on behalf of the lunatics previous to the commission under which *Martha* and *Mary* were declared lunatics, and the Court on their behalf considered what was best to be done, and what the Court did was to concur in the sale already made. I am of opinion that the Court had power, just as they might have concurred in a sale then to be made, to concur in a sale which the other tenants in common had previously made. That is what I think they did. Then the concluding part of the section says that the proceeds of the sale are to be considered as part of the real estate. I come to the conclusion also (although there is more difficulty about that), that the same observation really applies to the mines. The Court must have acted under the 124th, the 130th, or the 131st section, in confirming the lease of the mines. I think it could hardly be a lease under the 130th section. That enables the Court, where a lunatic is entitled in fee to an open mine, to make a lease of that mine for such a term of years, with such rents, royalties, reservations, covenants and agreements as the Lord Chancellor shall order. If the Court acted under that section, they would clearly reserve a yearly rent or royalty, and whatever part of the rent or royalty became due during the lunatic's lifetime, would be personal estate, and the heir would be entitled to any rent or royalty which became due after the death of the lunatic. But if this was to be considered as a lease under this section, the heir would be entitled to the mine—to the legal estate and the reversion in it—but no part of the proceeds would belong to him. I do not think it can properly be considered a lease under the 130th section, and there is also a difficulty in taking it under the 131st section, supposing it is to be considered as an unopened mine. It appears to

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me, with regard to the other mode of dealing with the minerals or the surface of the land, that the covenant as to the minerals is not such an one as the Court would have assented to if it had been asked in the first instance what sort of lease should be made of the lunatics' mines, either open or unopened. In substance the Court really confirmed a sale of the lunatics' mines, that is, part of the lunatics' real estate, which had been made by the tenants in common, and therefore that must follow the same rule as the sale of the real estate itself. I also agree with what the Lord Justice has said as to the particular contracts made with *Mary*.

Their Lordships ordered that the costs of and relating to the sales should be paid out of the real estate. Each party to have his own costs of the present application.

Solicitors for the Appellants: Messrs. *S. F. Miller & Son*, agents for Mr. *J. H. Thursfield, Wednesbury.*

Solicitors for the Respondent: Messrs. *Clarke, Woodcock, & Ryland.*

L. JJ. 1874 *Nov.* 21.

Ex parte MACKENZIE. *In re* HELLIWELL.

Bankruptcy Act, 1869, *s.* 126—*Composition—Registration of Resolutions—Answer by Debtor to Inquiries.*

2 C.L.D. 330
10 C.L.D. 295.
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At a meeting of creditors under a petition for liquidation the solicitor of a creditor asked the debtor whether a certain letter was in his handwriting. He replied that it was not. He was then asked whether it had been written by his authority. His solicitor thereupon asked to see it. This was refused, and the debtor, under the advice of his solicitor, declined to answer the question, and the examination was dropped, without the nature of the letter being made known to the meeting. Resolutions for accepting a composition were then passed:—

Held (affirming the decisions of the Registrar, the County Court Judge, and the Chief Judge), that there had been no such refusal by the debtor to give information as would render the resolutions invalid.

THIS was an appeal by *Mackenzie & Co.*, creditors of *Helliwell*, from a decision of the Chief Judge refusing to vary an order of the Judge of the County Court at *Halifax* confirming an order

of the Registrar for the registration of resolutions for composition.

Ralph S. Helliwell carried on business at *Halifax* under the firm of "*R. Horsfall & Co.*," and about the beginning of May, 1874, he presented a petition for liquidation. The first meeting of creditors was held on the 28th of May.

Some days before the meeting it came to the knowledge of the Appellants that a letter, dated the 13th of March, 1873, had been written to Messrs. *Hawkes*, who were creditors of the debtor, which letter was in the following terms:—

"Gentlemen,—I reply to yours of the 11th, I beg to say that I have a partner and friend in the widow of the late Mr. *Horsfall*. Hoping this will sufficiently answer your inquiries, I beg to remain, "Yours respectfully,

"*Ralph S. Helliwell.*"

The Mrs. *Horsfall* referred to in this letter was, it appeared, the widow of the person to whose business *Helliwell* had succeeded.

The Appellants' solicitor, on the morning of the 28th of May, shewed this letter to *Helliwell's* solicitor, and asked him for an explanation. None was given. At the meeting of creditors, Mr. *Hodgson*, the Appellants' solicitor, claimed the right to examine *Helliwell*, produced this letter, and asked him whether it was in his handwriting. *Helliwell* replied that it was not. Mr. *Hodgson* then asked him whether it was written by his authority. Mr. *Leeming*, *Helliwell's* solicitor, thereupon asked to see the letter, but Mr. *Hodgson* refused to shew it him. Mr. *Leeming* then advised *Helliwell* not to answer the question: he accordingly declined to do so, and the examination proceeded no further. Nothing was stated to the meeting as to the contents of the letter. Resolutions were then passed for accepting a composition. The Appellants opposed the registration of them on the ground that the debtor had refused to answer the question put to him. The Registrar overruled the objection, his view was upheld by the County Court Judge, and the decision of the County Court Judge was affirmed by the Chief Judge.

Mr. *Winslow*, Q.C., and Mr. *Horton Smith*, for the Appellants,

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referred to *Ex parte Pooley* (1); *Re Davis* (2); *Ex parte Levy* (3); *Ex parte Campbell* (4).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Respondent, referred to the *Bankruptcy Act*, 1869, s. 126, and Rules 268, 271, 276, of the *Bankruptcy Rules*, 1870.

Mr. *Winslow*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the concurrent judgment of the Registrar, the County Court Judge, and the Chief Judge ought to be affirmed. It is, I agree, of the utmost importance that dissentient creditors should have the fullest opportunity of putting questions calculated to ascertain all material facts relating to the debtor's affairs: at the same time it is important that a creditor should not be allowed to go to a meeting for the purpose of raising an objection and keeping it in his pocket till a later stage of the proceedings. In the present case a piece of paper was put into the debtor's hand and he was asked whether it was his writing. He answered that it was not. He was then asked whether it had been written by his authority. His solicitor, who was present, said, "Let me look at it." This was refused: I cannot say why: no reason has been alleged; it may be that there was a rivalry between the solicitors as to which of them was most skilled in the practice relating to the examination of witnesses. It is said that the same paper had been shewn to the solicitor on the morning of the same day. If so, why was he not told so? The paper might have been a paper wholly unconnected with the debtor's affairs. If it was intended to found any objection on the contents of the paper, he ought to have been questioned in this sort of way: Was Mrs. *Horsfall* ever your partner? Did you ever say she was your partner? Look at that letter—is it in your handwriting? All that passed was that the debtor was asked whether a paper, as to the contents of which nothing was said, was written by his authority. I think it not unreasonable that he should ask his

(1) Law Rep. 5 Ch. 722
(2) 19 W. R. 524.
(3) Law Rep. 11 Eq. 619.
(4) Ibid. 5 Ch. 703.

solicitor whether he ought to answer, and I can see no harm in allowing him to have such advice. It does not follow because a man is a debtor making a composition with his creditors that every circumstance in his past life can be inquired into. I believe that here the questions were not put *bonâ fide*, but for the purpose of laying ground for an objection.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is a requisition of the 126th section that the debtor shall be present at the meetings and "shall answer any inquiries made of him," and it is therefore a ground of objection if he has refused at the meeting to answer any material question. On the other hand, it is obvious that he cannot be required to answer immaterial questions, and when an objection of the present kind is taken it must be seen whether the debtor has refused to answer any question which he ought to have answered. The Court must look to the interests of all the creditors, and I think that here the Registrar rightly considered that there had not been any refusal to answer a question which the debtor was bound to answer. All turned upon this: whether the debtor's solicitor was to be allowed to see a paper before the debtor answered the question whether it had been written by his authority. The paper had been shewn to the solicitor that morning, and what possible reason could there be why he should not be allowed to see it again? In my opinion, the refusal to answer the question till the solicitor had seen the paper was not such a refusal to give information as ought to affect the validity of the registration.

Solicitors: Messrs. *Burton, Yeates, & Hart;* Messrs. *Bower & Cotton.*

L. JJ. 1874 Nov. 9, 10.

In re CORPORATION OF HUDDERSFIELD AND JACOMB.

Arbitration—Time for Complaint—Notice of Motion—Parliamentary Notice—Extent of Land taken—Minerals under Land—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *s.* 18.

Where a submission to arbitration has been made a rule of the Court of Chancery, service of a notice of motion to set aside the award is a complaint within the meaning of 9 & 10 Will. 3, c. 15, s. 2, and is in time, although the motion will not be heard until after the time limited by the Act.

A corporation served the usual notice on a landowner before applying to Parliament for power to take his land. The Act when obtained gave them power to take more of his land than was described in the notice:—

Held, that the corporation was not prevented from taking more land than was described in the notice:

Held, that under the circumstances the corporation were not obliged to take the mines and minerals under the land taken by them.

Decision of *Malins*, V.C., affirmed.

THE Corporation of *Huddersfield*, intending to apply to Parliament for power to construct waterworks, deposited the usual plans, and gave to Mr. *Jacomb* notice of their intention to apply for power to take lands, part of a farm of which he was part owner, the notice being that the land to be taken would be within eleven yards or thereabouts of the centre line of their plans. The plans shewed that a conduit would run through these lands, and shewed limits of deviation much beyond the eleven yards mentioned in the notice. The corporation obtained their Act empowering them to construct the works, and to deviate laterally within the limits of the lateral deviation shewn on the plans. The Lands Clauses Consolidation Act and the Waterworks Clauses Act were incorporated with the Act. The corporation then gave to Mr. *Jacomb* the usual notice to treat for his interest in land extending beyond the eleven yards on each side. Mr. *Jacomb* refused the terms offered, and the corporation thereupon proceeded under their Act to arbitration. Mr. *Jacomb* then perceived that the corporation proposed to take a strip of land thirty-three yards wide, and did not confine themselves to the eleven yards on each side as mentioned in his notice. Mr. *Jacomb* also claimed damages for severance of the mines and minerals,

and also required the corporation to take the mines and minerals under the land. He took this objection and made these claims before the umpire, who held that he must proceed on the notice to treat or not at all; and proceeded to value the whole land required by the corporation. He also said that in awarding compensation he should not be influenced by the evidence as to the value of the mines and minerals. On the 3rd of June, 1873, he made an award, giving to Mr. *Jacomb* £95 10*s.* for his interest in the land taken; and the award was taken up by the corporation on the 20th of June.

On the 14th of November the corporation made the submission to the award a rule of the Court of Chancery. On the 20th of November Mr. *Jacomb* gave notice of motion for the 25th of November to set aside the award on the grounds—1. That the notice to treat comprised lands which the corporation had no power to purchase and take compulsorily. 2. That the damages by the severance of the minerals was not taken into account. 3. That, though the corporation had by their acts elected to take the mines and minerals under the land in question, the value of such mines and minerals was not taken into account in estimating the amount of the purchase and compensation money payable.

Mr. *Jacomb* filed an affidavit in support of his motion.

The Vice-Chancellor *Malins*, on the hearing of the motion, held that the corporation were not by their original notice limited to the eleven yards on each side, and that the umpire was right in not valuing the minerals. The case is reported (1), where the facts are fully stated.

Mr. *Jacomb* now renewed the motion by way of appeal.

Mr. *Glasse*, Q.C., and Mr. *W. Barber*, for the Appellant.

Mr. *Higgins*, Q.C., Mr. *Bagshawe*, Q.C. (Mr. *F. G. Bagshawe* with them), for the corporation, objected that the motion was too late. The application was made under 9 & 10 Will. 3, c. 15, s. 2, which allows an award to be set aside only where the complaint is made before the last day of the next term after the arbitration or umpirage has been made or published to the parties. In the

(1) Law Rep. 17 Eq. 476.

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present case the award was published on the 20th of June, 1873, and the 25th of November was the last day of the following term. Notice of motion was given on the 20th of November, and an affidavit in support of the case was filed, but the motion did not come on till the 25th, which was too late: *Ross* v. *Ross* (1); *Harvey* v. *Shelton* (2); *Nichols* v. *Roe* (3); *Davis* v. *Getty* (4); *Dawson* v. *Sadler* (5).

SIR W. M. JAMES, L.J.:—

I think that the notice of motion, and the filing of an affidavit in support of it, constituted the commencement of a complaint in this Court within the meaning of the Act. Perjury might have been assigned on the affidavit, and if the motion had been abandoned, costs might have been recovered by the Respondents.

SIR G. MELLISH, L.J., concurred.

Mr. *Glasse*, Q.C., and Mr. *W. Barber*, then proceeded to argue on the merits for the Appellant, and cited *Simpson* v. *South Staffordshire Waterworks Company* (6).

Mr. *Higgins*, Q.C., Mr. *Bagshawe*, Q.C. (Mr. *F. G. Bagshawe* with them), were not called upon.

SIR G. MELLISH, L.J.:—

I am of opinion that this motion of appeal entirely fails, and that the Vice-Chancellor was quite right.

With reference to the first point, it is now settled law that what was contained in the notice to the landowner as to the width which the conduit was to be cannot affect the corporation, even if it got into the deposited plans, unless it was contained in the Act of Parliament. It is quite clear that the Act does not contain any such restriction as to the actual width which the conduit is to have; and even if there was a restriction as to the width of the conduit, the corporation are not, in purchasing the lands, confined to the precise number of feet that may be taken up by the conduit. It may be convenient for them, with reference to their works, to

(1) 16 L. J. (Q.B.) 138.
(2) 7 Beav. 455.
(3) 3 My. & K. 431.
(4) 1 S. & S. 411.
(5) Ibid. 537
(6) 6 N. R. 184.

have some feet of land on each side, and therefore upon the first point I think it is clear that they have not exceeded their powers.

Then the second question might, if it had arisen, require some consideration; but when we look at what is contained in the notice of motion, it is clear that the second objection taken by the notice cannot prevail. The second is this: "That in making his said award, the umpire refused to take into account the moneys payable by the said corporation to the said *Frederick William Jacomb* in respect of the damage occasioned to the said *Frederick William Jacomb* by the severance of the mines and minerals lying under the lands which the corporation were empowered to take, from the mines and minerals lying under such portion of the said lands and hereditaments as the said corporation were not empowered to take." What was really meant was this: it was assumed that, because in making the conduit they had dug up a certain portion of clay, that therefore they had elected to take the minerals. Then, upon the assumption of their having elected to take the minerals, Mr. *Jacomb* made two points, one of which is the third in this notice, namely, that the arbitrator should have given the value of the minerals which had been taken, and the next, that the land having been taken, and becoming the property of the corporation down to the centre of the earth, the consequence will be that Mr. *Jacomb* will not be able to get from his minerals on one side to those upon the other. That is what was put forward. Some minerals were dug up in making the conduit, and it is said that this obliged the corporation to take all the rest of the minerals. As to the minerals necessarily dug up in making the conduit, for those compensation should be given, and, I presume, was given; but it does not follow that because some small portion of clay was dug up in making the conduit, therefore the corporation were obliged to take the rest. The clause still is applicable that minerals are to be reserved. The consequence is that the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Messrs. *Williamson, Hill, & Co.*; Messrs. *Van Sandau & Cumming.*

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Nov. 12, 17, 18, 19, 20;
Dec. 10, 11, 14.

PARKER *v.* McKENNA.

[1870 P. 111.]

Directors—Purchase by Trustees—Charges of Fraud—Costs.

The Defendants, in 1864, were four of the directors of a joint stock bank. In that year resolutions were passed to increase the capital by the issue of 20,000 new £50 shares, which were to be offered to the old shareholders at the rate of one new share for each old share held by them, each allottee paying for each share £25 premium, and £5 as a first call. The shares not taken up by them were to be disposed of by the directors at £30 premium. The directors entered into an arrangement with *S.*, for him to take at £30 premium all the shares not taken up by the old shareholders. In pursuance of this, 9778 shares were allotted to *S.*, who paid only £5 per share, it being arranged that the certificates for these shares should be withheld, that the bank should have a lien on them for the premiums, and that no transfer from him to any purchaser should be registered till the £30 per share on the shares transferred had been paid. *S.*, being unable to take up so many shares, applied to the Defendants to relieve him of some of them, and they severally took from him considerable numbers at £30 per share, and afterwards disposed of them at a profit, the £30 per share being paid to the bank at the times when the shares were respectively registered in the names of purchasers :—

Held (affirming the decision of *Bacon*, V.C.), that the Defendants must respectively account to the bank for the profits made by them respectively by sale of the shares.

The bill, which was filed on behalf of the bank, alleged to the effect that the new capital had been created in pursuance of a scheme formed by the Defendants to procure its creation, not for the purpose of benefiting the bank, but with the view of themselves becoming possessed of some part of it for their own benefit, and that they improperly used their powers as directors for allotting shares to *S.*, with a view of themselves becoming possessed of them. The facts on which the relief granted by the Court was founded were not disputed, but a vast mass of evidence was gone into on the subject of the above allegations, for which, in the opinion of the Court of Appeal, there was no foundation. The bill, though prominently putting forward the alleged scheme as a ground of relief, also made a case for relief on the ground that the transaction was a purchase of trust property by trustees :—

Held, that, as the bill made a case which entitled the Plaintiff to relief, which case was separable from the case of fraud, relief must be given ; but that so much of the bill as was founded on the case of fraud ought to be dismissed with costs, and that the decree should give the Plaintiff no costs of the rest of the suit.

THIS case came before the Court on four several appeals by the four Defendants, Sir *Joseph McKenna*, *Vanderbyl*, *Lewis*, and *Henshaw*, from a decree of Vice-Chancellor *Bacon*.

The Defendants were, in 1864, four of the directors of the *National Bank of Ireland*, a company governed by the statute 7 Geo. 4. c. 46, and having a nominal capital of £1,000,000 in £50 shares, on which £30 per share had been paid up.

On the 16th of February, 1864, resolutions were passed by the board of directors for calling special general meetings of the proprietors on the 23rd and 24th of March, to consider the propriety of increasing the capital by the creation and sale at a premium of 20,000 new shares of £50 each. The second resolution was as follows:—

"That the committee of management be authorized to enter into a provisional agreement with solvent and respectable applicants to sell to them at the price of £30 premium per share all such shares as may be offered to the shareholders at the price of £25 per share premium, but which shall not have been accepted by such shareholders, provided nevertheless that the committee of management shall exact, as conditions of such provisional agreement, that the intending purchasers shall lodge a sum of £25,000 with the bank as a guarantee that they will duly fulfil their part of such contract if it ceases to be provisional and becomes absolute, and that they will take up such shares at the rate of not less than 1000 shares per month, previously paying for same in addition to the sum of £25,000, which is to continue a guarantee in the hands of the bank until all the shares shall have been fully taken up and paid for."

On the 24th of February the directors issued a circular to the shareholders, explaining the nature of the arrangement for the increase of capital. This circular contained the following passages:—

"The directors have long felt the important advantages to the bank to be derived from augmenting the capital and reserved fund, and you will in a few days find an advertisement in the *Gazette*, the effect of which is to call together the shareholders to confirm, if agreeable to them (as no doubt it must be), a proposition for increasing the paid-up capital and reserved fund by the issue at a premium of £25 per share of 20,000 new £50 shares, which in the first instance will be offered to the present proprietors of the bank

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in the proportion of one new to every one old share now held by them." . . . . "Foreseeing that some of our proprietors, whose pecuniary arrangements are of a fixed character, will be unable or unwilling to take up the new shares offered to them, the directors have entered into a provisional arrangement with certain capitalists here, who are bound to take over every unaccepted new share at an extra premium of £5, making the total premium upon the share as it will be taken up by them, £30. The directors do not propose that the bank shall also add this extra £5 per share to the reserved fund, but that those present proprietors who, whether from choice or other causes, do not take up their allotments of the new shares, shall be entitled to receive in respect of every new share so unaccepted by them a cash bonus of £5."

The meetings were held on the 23rd and 24th of March, and resolutions were duly passed and confirmed authorizing the issue of new shares. The first three resolutions were as follows:—

"That the original capital of the society (being £1,000,000, divided into 20,000 shares of £50 each) be increased by the creation and sale at a premium of 20,000 new shares of £50 each, of which the sum of £5 per share in addition to the premium shall be paid at the time of the allotment or delivery thereof, and of which the further sum of £25 per share (making with the first £5 paid a total of £30 per share and being equal to the amount per share now paid up of the original capital) shall be paid by such instalments and at such times as shall from time to time be ordered and called for by the court of directors; but so that no such instalment shall exceed £5, and so that there be an interval allowed of not less than three calendar months between instalments.

"That after the payment of £30 per share in respect of each new share, all further calls (if any) on account of the remaining £20 per share shall be made equally upon all shares of the company old and new.

"That the new shares shall, in the first instance, be offered to the present proprietors respectively, at a premium of £25 per share, in the proportion of one new share for each old share, and that such of the new shares as shall not on or before the 9th day of April next have been accepted by the present proprietors respect-

ively on the terms of these resolutions (including the payment of the first £5 and of the premium), shall be sold by the directors to any other person or persons at a premium of £30."

In the meantime letters dated the 23rd of February, 1864, had been exchanged between the board of directors and Mr. *Stock*, the person referred to by the circular under the description of capitalists who were bound to take the unaccepted shares. Mr. *Stock's* letter was as follows:—

"I will to-day hand you £25,000, which you will please place on deposit account in the joint names of myself and any director of your bank on the most favourable terms as to interest your rules from time to time allow, and it is understood that the said deposit shall stand as a guarantee and indemnity in your hands that I will for myself alone, or with others, take up from you at a premium of £30 per share, all the new shares in the capital of your bank which may not be accepted by the present proprietors, on the condition on which the same are first offered to them, it being also understood that I am to have all the shares declined by or not taken up by proprietors of original shares, and that I am to take up and pay for same at the rate of 1000 shares per month as a minimum rate of liquidation."

The secretary's letter, sent by the authority of the board, was as follows:—

"I am instructed by the directors to acknowledge the receipt of your letter of this date, tendering the sum of £30 per share premium for the shares of the proposed new issue which may not be taken up by the shareholders of the *National Bank*, on the terms first offered to them, and agreeing to lodge the sum of £25,000 as indemnity for your carrying out said contract at the rate of 1000 shares per month, and I have to say that the offer is accepted, subject to this condition—that the directors shall have the right to decline delivering the shares except to parties whose names shall have been previously submitted to and approved by them."

On the same 23rd of February, 1864, the guaranteed deposit of £25,000 was paid into the *National Bank* to the joint account of *Stock* and *Lewis*.

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The old shareholders took up only 9547 of the new shares, leaving 10,453 untaken. On the 13th of April *Stock* paid a further sum of £25,000 into the bank, making together, with the former £25,000, a payment of £5 per share on 10,000 shares. On the 19th of April, at a meeting of the directors at which the Defendants were present, 9778 of the 10,453 shares were allotted to *Stock*, and the residue to other persons. The sum of £1110, the excess of the £50,000 over £5 per share on 9778 shares, was returned by the bank to *Stock*, an arrangement being made by the directors with him that the certificates of the shares allotted to him should be withheld by the bank, and that the bank should have a lien on the shares for the sum of £30 per share, and that no transfer from him to any purchaser should be registered until payment to the bank of the sum of £30 per share on the shares so transferred.

The shares in respect of which the Defendants were sought to be made liable in the suit were part of the above 9778 shares, and the circumstances under which the Defendants severally acquired them were thus stated by themselves in their answers:—

Sir *Joseph McKenna*, as to 1750 shares acquired by him, stated as follows:—"Even after the number of new shares which had to be allotted to *Stock* had been reduced to 9778, he was still very desirous of finding persons to relieve him of a considerable number of those shares. It was as to those shares also very important to him that the persons to take them should be persons of such position from their connection with the bank or commercial standing that they would not be likely to throw them upon the market at once, and thus come into competition with him in the sale of the rest of the shares remaining on his hands. Under these circumstances *Stock* applied to me and to the other directors of the bank to take some of the shares from him ourselves, and also to assist him in finding good men to become purchasers of a portion of the shares, and he offered to let us and any such purchasers have the shares at the £35 per share (namely, the £30 premium, and the first payment of £5 by way of call), which he had to pay to the bank, although from other persons he would have expected a larger premium, so as to realize a profit." Sir *J. McKenna* then stated that in the first instance he and others were unwilling to

accede to this request of *Stock's*, but ultimately, "I believe that, under these circumstances, *Vanderbyl* agreed to take 500 out of the 9778 shares from *Stock*, at £30 premium, and that *Henshaw* agreed to take 300, and that *Lewis* agreed to purchase 1000 shares. Down to the time when they agreed to purchase those shares, I had not taken or agreed to take any of the new shares from *Stock*, but had actually refused to do so, and though I had no doubt of the success of the operation, I should not have taken any of those shares from him at all if it had not been impressed upon me that my refusal would be misconstrued, and imply that I had no confidence in the result." Then, further: "After *Lewis* had agreed to purchase 1000 new shares from *Stock*, and on or about the 27th of April, *Stock* came to me and said that if he could not effect sales of 2500 shares more than he had already placed, the burthen would destroy his peace of mind, and a great deal more to that effect, and he pressed me to purchase 1000 of the new shares from him, at the price he had to pay for them. I told him that if I agreed to purchase 1000 from him as he asked, he would still have 1500 in excess of what he wished to have, to disturb his mind and make him anxious, or some words to that effect; but after some conversation, I told him that if the Defendant *Lewis*, whom I knew to be a rich man, would take 1750 in lieu of the 1000 he had agreed to take, and thus leave *Stock* with 1750 only of the 2500, I would buy the whole of that parcel of 1750 shares, but that I would not do so unless *Lewis* or some equally good man would take the other 750 shares. *Lewis* was not present on that occasion, and at the request of *Stock* I put my offer in writing and handed it to him." He also stated that, as a memorandum of the agreement by him to purchase 1750 shares, *Stock* signed this document:—"I have this day sold to *J. N. McKenna*, Esq., 1750 of the *National Bank* new shares, at the same price at which I have obtained same, say at a premium of £30 per share, deliverable to him, and payable at the same ratio at which I am to pay for same." The opinion of *McKenna* as to the advantage of having these shares at this time, appeared from a letter written by him on the 20th of April to *Anthony Fox*, who wished to have 100 shares:—"My dear *Anthony*, if you write to me a note, apply for eighty shares from any friend of mine who holds them, and you tell me

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whether you want them to sell or not, say for the next nine months, I will try to carry out a good affair for you, such as I spoke of. There is no use asking me for more than eighty. I thought to get 100 for you, but I am short, or rather over my calculations. I hope you are sure I do my best for real friends."

Mr. *Lewis*, by his answer, stated as follows:—"On or shortly before the 16th of April, 1864, and therefore nearly two months after the arrangement had been made with *Stock*, he applied to me and informed me that so unexpected a number of shares had been thrown upon him, that he found himself in a difficulty about them, and urged me to take as many as I could off his hands. Ultimately, but with some reluctance, I agreed to purchase from *Stock* 1000 shares out of the number which he had taken by his contract, at the same price which he was to pay to the bank. Towards the end of April *Stock* again applied to me, and urged me to take a further number of shares, as he was in difficulty about them. I consulted *McKenna* on the subject, who confirmed *Stock's* representations to me, and stated that, unless *Stock* could at once dispose of some of his shares, he might be obliged to throw a large quantity of the shares on the market at one time, or possibly might be unable to carry his contract into effect, as the said new shares were then saleable only at a nominal premium; and that, in either of these cases, the bank would be brought into discredit. I was most unwilling to increase my stake in the said bank, but believing that if the newly-created capital was not taken up by the general public the bank (being one of unlimited liability) would be involved in discredit and danger, and the shares which I held would be deteriorated in value, and I might be involved in ruinous loss, I consented to purchase in all 1750 shares from *Stock*, being the same number which *McKenna* informed me that he proposed to take. However, I did so with great reluctance, and solely in order to support and promote the interests of the bank, and protect my own property invested in it, and because, after much anxious reflection, it appeared to me necessary that I should do so. Accordingly, I believe that *Stock* handed to me a contract note for the 1750 shares, by which I rendered myself personally liable to pay to him the premium or purchase-money of £30 per share on all the shares. Of course I did not intend to hold

so large a number as 1750 shares in addition to the large number of shares which I already held; but inasmuch as it was impossible, and would have been contrary to the practice adopted by the bank, for me, as a director, to sell shares out of my own name, I made it a condition of my contract with *Stock* that he should sell the shares from time to time on my account and at my risk; and should out of the proceeds of such sales retain the purchase-moneys which I had contracted to pay him, and also pay the calls which should become due to the bank in respect of the said shares before the sale thereof."

Vanderbyl, by his answer, stated as follows:—"During the year 1864 I purchased *bonâ fide* from *Stock* and paid him for 500 of the shares allotted to him. I purchased those 500 shares at £30 per share premium, besides the calls thereon. I procured 100 of the said 500 shares to be registered in my own name, and the remaining 400 of the 500 shares in the names of mortgagees from whom I had taken up loans." He went on to say that all those shares were ultimately sold by him. He did not mention the precise date when his purchase was made, but on cross-examination he stated that he was present at the board and heard the conversations which went on there as to the number of shares to be taken by the different directors, and that he himself urged a director who had since died (Mr. *Usborne*) to take some of the shares for the purpose of lessening those that would remain in the hands of *Stock*, from which, in the view of the Court, it was to be inferred that the shares which he purchased were purchased at the same time that *McKenna* and *Lewis* purchased theirs.

Mr. *Henshaw*, by his answer, stated as follows:—"In or about the month of April, 1864, and some time after the arrangement had been made with *Stock*, *McKenna* spoke to me and represented that *Stock* had more shares thrown on his hands than had been expected, and was anxious, in consequence of his heavy responsibility, to get rid of a large number of them at the same price which he was to pay to the bank, and without deriving any profit from the sale thereof. *McKenna* further stated that unless *Stock* could at once dispose of some of his shares, he might be obliged to throw a large quantity of the shares on the market at one time, or possibly might be unable to carry his contract into effect,

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as the new shares were then saleable only at a nominal minimum premium, and that in either of those cases the bank, which was one of unlimited liability, would be brought into discredit and danger, and the interests of the shareholders greatly prejudiced. Under these circumstances *McKenna* pressed me to buy some of *Stock's* shares. I ultimately consented to purchase 300 new shares from *Stock* at the premium of £30 per share. Accordingly, in the month of July, 1864, *Stock* transferred 40 shares into my name, and I paid him £1200, being the premium thereon, and paid or accounted for a like sum to the bank in respect of the calls on the 40 shares." The transaction was a little more complicated with regard to the other 260. They were part of a lot of 300 shares that *Stock* had mortgaged to a company in *Liverpool*, and that company accepted Mr. *Henshaw* as their debtor in place of *Stock*, the transaction being in substance the same as if it had taken place directly with *Stock*.

In August, 1865, resolutions were passed for increasing the capital by the issue of 40,000 new shares of £50 each, to be distributed among the existing proprietors in the proportion of one new share for every four old shares, each new share to be credited with £30 as paid up upon it; the shares not so disposed of to be sold by the directors. These shares were called "bonus shares," and were issued in pursuance of the resolutions. The Defendants received bonus shares in respect of the shares which they had acquired from *Stock* in the manner mentioned above.

The shares thus acquired by the Defendants were sold by them at a profit at different times; the bank received the £30 premium in respect of each of the shares, except bonus shares, but in most cases not until the shares were sold.

The present bill was filed in 1870 by the public registered officer of the bank against *McKenna*, *Vanderbyl*, *Lewis*, and *Henshaw*, and was subsequently amended. It stated that in 1864 the Defendants, although no fresh capital was wanted for any purpose conducive to the interests of the bank, resolved to increase the capital by the issue of new shares with a view of getting possession of some of them for their own benefit—that *Stock* and a person named *Fernie*, who acted in concert with him, were known to the Defendants to be persons of no means, that a secret understanding

was come to between the Defendants and *Stock*, acting on behalf of himself and *Fernie*, that in consideration of the Defendants procuring the acceptance of an offer by *Stock* and *Fernie* to take up all the intended new shares which were not taken up by the original shareholders, *Stock* and *Fernie* should appropriate for the benefit of the Defendants or their nominees, a large number of the shares at the same price as *Stock* and *Fernie* paid for them, and that the Defendants would obtain leave for *Stock* and *Fernie* to postpone payment of the moneys payable on the shares (except £5 per share) until the shares were sold. The bill then stated the proceedings relative to the creation and issue of the new shares and the arrangement with *Stock*. The bill then alleged that the Defendants, in order to give effect to their scheme, wilfully abstained from taking steps which would have caused the new shares to be taken up and paid for at once by other persons than *Stock*. That the Defendants allowed only the short period of sixteen days for taking up the shares, in order that the shareholders might be prevented from taking them, and that the shares to be taken by *Stock* might so be increased. The bill then stated the acquisition by the Defendants of shares from *Stock*, and alleged as follows :—

"165. The Defendants pretend that the hereinbefore-mentioned allotment of the aforesaid 9778 shares to the said *T. O. Stock* was a *bonâ fide* allotment to him, and that there never was any such secret agreement or understanding between him and them as is hereinbefore alleged, nor, in fact, any agreement or understanding to the effect that he should hold the said shares, or any of them, for the benefit or under the control of the Defendants or any of them, and the Defendants further pretend that they *bonâ fide* purchased such shares from the said *T. O. Stock*, and that they were entitled to hold the said shares and to dispose of them for their own benefit, and are entitled to retain all profits arising from the sale of the said shares; but the Plaintiff charges the contrary of such pretences to be true, and charges that the said shares were obtained by the Defendants in pursuance of the secret understanding hereinbefore mentioned or of some agreement or understanding to that effect. And the Plaintiff further charges that even if there were no such agreement or

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understanding the Defendants as directors of the bank gave to the said *T. O. Stock* credit and pecuniary accommodation and facilities in relation to the aforesaid shares, in return for which he did in fact sell to the Defendants or enable them to obtain large numbers of the aforesaid 9778 shares on such terms as to result in large profits to themselves, and the Plaintiff charges that the Defendants did in truth conspire together and make use of their positions and power as directors of the bank in order to obtain for themselves large profits by means of the allotment and subsequent dealings with the aforesaid 9778 shares. And the Plaintiff charges that the Defendants were trustees of their aforesaid powers for the bank, and that it was a breach of trust on the part of the Defendants to exercise their said powers as they did for their own private advantage."

There was also a further case made by the bill against Sir *J. McKenna* as to two parcels of shares, one of 1600 and the other of 900, forming further parts of the 9778 shares. The bill alleged that these shares were disposed of as a joint speculation by Sir *J. McKenna* and *Fox*, a broker in *Dublin*, though, for the sake of appearances, they were placed in other names, that they were taken by *McKenna* and *Fox* from *Stock* at a slight advance above what he paid for them, and that *McKenna* and *Fox* were to divide the profits. Sir *Joseph McKenna* positively denied having any interest in these shares, and was supported by *Stock*. The evidence of *Fox* was directly contrary, and appeared to be corroborated by a number of letters from *McKenna*.

The bill prayed, 1, that it might be declared that the issue of the 9778 shares to *Stock* was a fraud and breach of trust on the part of the Defendants, and that they were jointly and severally liable for the moneys which would have been received by the bank if those shares had been properly issued and disposed of, and that the amount of such moneys might be ascertained, and that the Defendants might be decreed jointly and severally to make good the same, or that at all events the Plaintiff might have the relief thereafter prayed, namely, 2, that it might be declared that the Defendants were trustees for the *National Bank* of all moneys which they received from the sale or disposition of any of the 9778 shares, and were liable to account to the bank for all such moneys,

and that the amount of such moneys might be ascertained, and that the Defendants might be decreed to pay to the bank the amount which should be found due from them in respect of such moneys, together with interest thereon. Paragraph 3 asked for a similar declaration and decree as to moneys received by the Defendants from the sale of bonus shares issued in respect of any of the 9778 shares.

On the 4th of August, 1874, Vice-Chancellor *Bacon* made a decree (1) containing declarations according to the 2nd and 3rd

(1) 1874. Aug. 4. W.N. (1874) 181.

SIR JAMES BACON, V.C., after stating the facts, continued:—

The Defendants allege and plead in their answers that the increase of capital and the agreement with *Stock* was a prudent, valid, and beneficial arrangement, having regard only to the interests of the bank. In my view of the case this is a matter wholly immaterial with respect to this suit. The Defendants allege further that, *Stock* having become the purchaser of the shares which were allotted to him, he was competent to sell, and they were at liberty to buy from him, at such prices as they might agree upon, any of the shares; and that, inasmuch as the bank has in fact received £30 for each of the shares allotted to *Stock*, the Plaintiff, who sues in the name of the bank, has no cause of complaint. I am compelled to say that in this respect the Defendants take a singular and wholly erroneous view of their rights and their duties; and although they have so pleaded in their answers, have asserted it in their evidence, and although it has been elaborately argued by counsel on their behalf, the contention is, in my judgment, unsustainable, and is not only wholly erroneous in point of law, but is also irreconcilable with the most ordinary principles of morality. Making all allowances for the wilful blindness which affects men who look so earnestly and exclusively to their own pecuniary interests as to exclude or blind their perception of right and wrong, I find it difficult to impute to men of business such a want of understanding of the duties they had undertaken to discharge to their partners in trade as would account for, though nothing can excuse, the manner in which they have dealt with the common property. A case has been put in the course of the argument —the case of a trustee for sale of land —which, in my opinion, it is impossible to resist the application of. Try it by another and most ordinary transaction in trade. Suppose the case of a partnership of cotton merchants. Their managing partners contract to sell 100 or 1000 bales of cotton at a price fixed to some other merchant, but the goods are neither paid for nor delivered. He is unwilling or unable to perform his contract, and he proposes to some of the managing partners that they should take his bargain off his hands. Can they deal with the partnership cotton for their own benefit? If they had the power to let him off his contract, the goods would remain the property of the partnership, and must be re-sold by and for the partnership. But in no case could they become the property of individual partners. They were vendors for the partnership. They could in no case become purchasers for or from themselves. There is no substantial difference between the new shares and

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paragraphs of the prayer, and a declaration that *McKenna* was liable for one half of the profits made by the sale of the 1500 and 900 shares. An account was directed, against each Defendant, of

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the cotton in the case I was then supposing. The directors not being competent to purchase from *Stock* for themselves, they could not take his bargain off his hands for their own profit. They could not be substituted purchasers in his place and stead. And it would indeed furnish a ready means of safely committing a breach of trust if trustees, with a power and duty to sell, could sell to a person from whom they might afterwards buy, even though "from other persons" (to use the words of Sir *Joseph McKenna*) "he, *Stock*, would have expected a larger premium, so as to realise a profit." It would be a waste of time to refer to authorities in support of principles so obvious and just as those I have adverted to. The doctrine of Courts of Equity in this respect is so trite and familiar that it is no more necessary to prove it by decided cases than it is to establish any other first principles. The Plaintiff's counsel referred to the case of *York and North Midland Railway Company* v. *Hudson* (16 Beav. 485), in which it was decided that directors of a company—not more nor less a partnership than that which here subsisted—could not appropriate to themselves the profits they had made in dealing with shares in the company. The facts were not identical with those which are here presented, but the principle of the decision is in all respects applicable to the present case. The case of *Blissett* v. *Daniel* (10 Hare, 493) was also referred to, in which the duty of partners is expressed in terms which are so clear that it is unnecessary to quote it or refer to it. The principles upon which the decisions are founded were commented upon, especially in a case before Lord *Brougham* in *Hamilton* v. *Wright* (9 Cl. & F. 111), and were adopted by Lord *Hatherley* in deciding *Tennant* v. *Trenchard* (Law Rep. 4 Ch. 537), a remarkably strong case, in which the universal principle was carried so far that by force of it the plain legal right of a mortgagee to enforce his security was made subservient to his duty as a trustee to preserve and protect the estate upon which his mortgage was charged. In the course of the discussion I invited the Defendants' counsel to furnish me with any authority for the proposition they asserted, viz., that *Stock*, being the owner of the shares, was competent to sell to any one, and that the directors were competent to buy those shares from him as freely as they might have bought shares from any owner on the *Stock Exchange*. No such authority was referred to, for a very plain reason; and even if I were to admit without qualification the argument that *Stock* was competent to sell, I should deny that those Defendants, trustees as they were, could buy back from him for their own benefit the trust property which they had agreed to sell to him, even if they had not bought with a view to their own profit, and whether they had or had not made a profit by such dealing. With respect to the purchases by the Defendants of these 4300 shares, I am therefore of opinion that they must be decreed to refund whatever profits they may respectively have made by the re-sales they have effected of those shares. In coming to this conclusion, I by no means omit the consideration of the charges in the bill respecting the time and manner in which the bonus shares were created, nor the arguments

all profits made by the sale of the shares taken by him from *Stock*, with interest at £4 per cent. on such profits from the time of receiving them; and the Defendants were ordered to pay the costs

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which have been addressed to me upon the subject, although in this place I do not think it necessary further to dwell upon them. I consider that, with the exception of the transaction relating to the two parcels of shares (1600 and 900) I have mentioned, the facts I have recapitulated, and upon which my judgment is founded, are not substantially or materially disputed. What the Defendants have mainly insisted upon is their explicit and utter denial of any improper motives in any of the acts done by them and charged against them by the bill, and they have strenuously argued that the imputations made against them not being made out in evidence, the Plaintiffs are not only not entitled to the relief they pray, but cannot establish a title to any other relief. It cannot be questioned that the general rule adopted by this Court is to discourage at all times, and in proper cases with great severity, reckless, wanton, unfounded charges of misconduct (by whatever names they may be called) in their opponents. But in applying that rule regard must be had to the nature of the case and to the attendant circumstances. From 1864 to about the end of 1868, when the Defendants ceased to be directors, the shareholders, who are represented by the Plaintiff, allege that they were not aware of most of the circumstances upon which the charges they now prefer are grounded. Those charges consist in substance of inferences which they draw from facts which have been collected and discovered by means of an extensive and laborious investigation into the books of the company, and into correspondence and other documents, all of which are in evidence and have been commented upon at great length. From these materials they impute to the Defendants a preconceived determination to deal with the shares for their own benefit, and they insist that such imputation is sustained by the subsequent conduct of the Defendants. The Defendants each and all wholly deny any such alleged plan or any such intention as the Plaintiff imputes to them, and in this condition of circumstances I cannot say that the charges of combination, of preconceived arrangement, of mutual or separate action by the Defendants, are so proved that I can adopt them, nor is it competent for me to penetrate the motives by which the Defendants may have been actuated. But I think that the circumstances were such as to excite reasonable suspicion in the minds of the shareholders when they found that of the original dealing with *Stock*, a transaction involving the interests of the company to a great extent there was no trace in the minutes (although the letters were copied into a press letter-book), no sufficiently distinct mention of it at the meeting of March, 1864, when they found the manner in which the guarantee fund had been dealt with, the facilities which had been afforded to *Stock*, while accommodation had been refused to some of the shareholders, and the manner in which the several accounts had been kept and the shares dealt with in the books of the company, and this without a minute or record of any kind why those accounts had been so opened and kept; when they found that the manner in which the calls had been made and the bonus shares created had a direct tendency to increase the prospective

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of the suit up to the hearing. From this decree the Defendants severally appealed.

value of the shares of which the Defendants had become the transferees from *Stock*, and, further, that each of the Defendants had made large profits by his dealings in the shares. I recognise fully the force of the observations which have been addressed to me on behalf of the Defendants—that no one of them is responsible for what was done by or in the names of the directors generally; but each and every of them must be taken to have been fully cognizant of what was done by the body of which they were members, and of the consequences which would result from what was so done. The Defendants' contention that, the charges I have referred to not being proved, the Plaintiff's case ought to fail in its entirety, must be considered in this view. Now treating those charges, as I do, as not being strictly proved, and declining, as I do, to fix upon the Defendants severally any liability for what was done by or in the name of the directors generally, I cannot say that there does not remain upon the record a plain substantial title to relief. Nor can I say that the manner in which the dealings of the directors as a body of which the Defendants were members were conducted, was such as not to furnish any ground for the suspicions which the shareholders entertained, or impute to them such reckless, wanton, and unfounded imputations against the Defendants as should induce the Court to apply that rule which has been referred to. Laying, therefore, wholly out of consideration those imputations the consideration of which in no degree influences my judgment, I find myself obliged to deal with the case upon the general principles I have adverted to. The Defendants have urged also that the length of time which has elapsed since the events on which the Plaintiff relies ought to induce the Court to withhold any interference in his favour; but bearing in mind the fact that it was not until the end of the year 1868 that the attention of the Plaintiff was drawn to the state of things of which he complains, that some considerable period of time was of necessity employed in the investigations without which his case could not be completely stated, and that the bill was filed in June, 1870, I think that no time has been suffered so to elapse as to justify the Defendants' objection. Another ground of defence which has been suggested is, that the Plaintiff has selected four only out of the directors, whereas, if his complaint was well founded, he ought to have made all the directors now alive, and the representatives of such of them as are dead, parties to the suit. Considering the nature of the relief which is prayed and the circumstances of the case, I see no ground upon which all the directors should necessarily have been made parties; and as to the selection of four only out of a larger number of persons who may have been equally liable, I am of opinion that in the mouths of these Defendants that furnishes no objection. For in such case a Plaintiff is at liberty to prefer his suit against any of the persons of whom he has a right to complain, and it is no answer to his complaint to say that he may be entitled to complain also of others, since the liability of such others can in no degree diminish the liability which may attach to the persons selected. Nor can the result of this suit in any degree affect the Plaintiff's right to pursue any

Mr. *Glasse*, Q.C., and Mr. *North*, for *McKenna*:—

It is necessary for the bank to make out that there has been a breach of duty by the directors, and a loss in consequence.

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remedy he may possess against persons not parties to this suit. What I find and decide is, that the Defendants, being partners and trustees, have dealt with the partnership and trust property in an unlawful manner and for their own personal benefit. The Defendant, Sir *Joseph McKenna*, in his first answer, admits the purchase of shares from *Stock*, and the re-sale of those shares, together with the bonus shares, at a profit amounting in the aggregate, as I read it, to £15,750; from the answer of the Defendant *Harvey Lewis*, I gather that by the like means he has made and received profits amounting to £10,020. The Defendant *Vanderbyl*, in his answer, and in the schedule annexed to it, states his profits from the shares purchased by him of *Stock* to amount to £11,447 and a fraction, although in that statement he gives credit, and reduces the amount of his actual profits by some loss that he sustained in the *Hindustan Bank*—a matter which it is not now necessary to further observe upon. The amount of profits derived by the Defendant *Henshaw*, as stated in his answer, does not so clearly appear, owing to a somewhat involved statement of his dealings with the shares, although the number of shares acquired by him of *Stock* at the same time with the others is admitted. Mr. *Henshaw*, according to his account, as far as I understand it, seems to have borrowed from an insurance company which he mentions large sums of money for which the shares were mortgaged. They had been mortgaged by *Stock*. However that may be, that will be the subject of future investigation; and although he says he has not realized any considerable profits, on the admissions in his answer, the amount of his profits must be ascertained. Well, then, it has been suggested that I ought to decree against the Defendants that they are liable for the whole of the 9778 shares. On the frame of this record I think I can do no such thing. All I can say is that which I have expressed, that for every shilling of money received by these Defendants in the way of profit on shares derived by them from *Stock* they are liable, and they must refund to the very last shilling. Upon the whole, I think the Plaintiff is entitled to a decree declaring that the Defendants, as partners in, and trustees for, the *National Bank*, are accountable for and chargeable with, all the profits which they have received from the sale or disposition of any of the 9778 shares mentioned in the pleadings, and of any of the bonus shares issued to themselves or to their nominees in respect of any of the said 9778 shares, and directing an inquiry and account of all moneys which each of the Defendants has received in respect of such profits. There must also be an order for payment by each of the Defendants of the amounts which shall, upon such account and inquiry, be certified to be the amounts payable by them respectively, with interest at the rate of £4 per cent. per annum upon the amounts of such profits which have been received by them from the several times at which the same were received. And the decree will further direct that the Defendants do pay to the Plaintiff the costs of this suit up to the hearing.

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[The LORD JUSTICE MELLISH:—The case the Plaintiff makes is, that these directors being *quasi* trustees have made a profit which they ought to hand over to the company.]

The bank has got all it bargained for, £30 per share premium.

[The LORD CHANCELLOR:—Suppose that *Stock* was unable to complete his bargain, and the directors, or some of the directors, say, We will release you and stand in your place: must they not account for the profits?]

I submit not; each was entitled to buy from *Stock* just as a director may buy shares in the market. The case of *York and North Midland Railway Company* v. *Hudson* (1), referred to below, is quite different, and *Blisset* v. *Daniel* (2) has no bearing on the case. Then the bill is founded on a case of gross personal fraud and conspiracy, which is not in the slightest degree supported by the evidence; and the case being thus founded on fraud, the Plaintiff is not at liberty to pick out facts which would support a case not founded on fraud, and obtain relief upon them, no such alternative case having been made by the bill: *Hickson* v. *Lombard* (3). The bill ought therefore to have been dismissed altogether, and if not, the Plaintiff ought to pay the costs up to the hearing. As to the shares sold by *Fox*, no declaration was asked by the bill; and we submit that it was therefore against the course of the Court to make one; the most that could be done was to direct an inquiry, there being a conflict of evidence.

Mr. *Bristowe*, Q.C., and Mr. *Tahourdin*, for *Vanderbyl*:—

Vanderbyl paid for his shares at the time he took them from *Stock*, and almost immediately after the arrangement with *Stock*. They remained standing in his own name for some time afterwards, so that his case is better than that of Sir *Joseph McKenna*, whose shares were some of them sold before they had been paid for. *Stock* had become the equitable owner of the shares, and was at perfect liberty to sell them to any one, and directors were at liberty to buy from him, the fiduciary relation being at an end as to those shares.

(1) 16 Beav. 485. (2) 10 Hare, 493.
(3) Law Rep. 1 H. L. 324.

[The LORD CHANCELLOR:—Was it at an end, the contract with *Stock* being still executory?]

The allotment to *Stock* concluded the matter, for he would have been a contributory in respect of the shares if there had been a winding-up. We submit, therefore, that the contract was an executed contract, which made *Stock* master of these shares, so that he could sell them to any body whether a director or not. Then, as to the case of fraud, the bill ought to be dismissed altogether; for if you strike out the allegation of fraud, there is no case: *Archbold* v. *Commissioners of Charitable Bequests* (1).

Mr. *Everitt*, for *Henshaw*:—

Out of *Henshaw's* 300 shares 260 had been issued to *Stock*, who had mortgaged them. *Henshaw* paid off the mortgage and took to the shares, so he stands completely in the ordinary position of a director buying shares in his company.

[The LORD JUSTICE MELLISH:—But you were under a previous agreement to take 300 shares, and this was the way of carrying out that agreement.]

There is nothing to shew any antecedent binding arrangement to take 300 shares. If any relief is given in this suit, it should only be on the terms of the Plaintiff paying all the costs of it.

Mr. *Fry*, Q.C., and Mr. *Davey*, for *J. Harvey Lewis*:—

The Vice-Chancellor says that he decides on the admitted facts. There are two questions: whether these admitted facts constitute an equity at all, and, if they do, whether effect can be given to it on such a record as this. On the first point, we only add that a director is in a peculiar position: he is required to be a shareholder, and may be a shareholder to any extent, although his being a large shareholder may often bias him in the affairs of the company; *e.g.*, on such a question as whether a call should be made. The position of a director is different from that of a trustee who does not take an interest, and the acquiring an interest which may give him a bias adverse in some respects to the company is not objectionable unless he is led by it to act improperly.

(1) 2 H. L. C. 440.

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Then we contend that the bill is multifarious, the case against each Defendant being separate.

Mr. *Kay*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Graham Hastings*, for the Plaintiff:—

The contract with *Stock* was *ultrà vires*, and not authorized by the resolutions. But supposing it was authorized, no director, when *Stock* found himself unable to fulfil it, had any right to take a part of it off his hands for his own individual benefit. As to the *Fox* shares, we submit that Sir *Joseph McKenna's* interest in them is proved by the evidence, and that being so, and the case being raised in the pleadings, a declaration on the subject was proper. The Defendants ought to be treated as jointly liable for all the profits made by them, for they concurred in a scheme by which, through *Stock*, they all became purchasers; and if the decree is to be varied at all, it should be varied in this respect. There is good ground to infer that the whole scheme was entered into by the Defendants with a view to their personal benefit; but supposing this not to be proved, there still is the case of breach of trust in purchasing the shares sufficiently raised on the bill to entitle the Plaintiff to a decree, and there should be no variation as to costs, the case being one where the conduct of persons in a fiduciary position was such as to justify a suit: *Fyler* v. *Fyler* (1); *De Montmorency* v. *Devereux* (2).

Mr. *Glasse*, in reply, for Sir *J. McKenna*.

Mr. *Bristowe*, in reply, for *Vanderbyl*.

Mr. *Everitt*, in reply, for *Henshaw*.

Mr. *Fry*, in reply, for *Lewis*.

LORD CAIRNS, L.C.:—

The decree which is appealed against in this case in substance makes the Appellants accountable to the bank under three different heads. In the first place, it makes the Defendant *McKenna* accountable for profits made by him in respect of 1750

(1) 3 Peav. 550. (2) 7 Cl. & F. 188, 234, 239.

shares; *Lewis*, for profits made by him in respect of 1750 shares; *Vanderbyl*, for profits made by him in respect of 500 shares; and *Henshaw*, for profits made by him in respect of 300 shares. In the second place, it makes the Appellants responsible for all moneys which they have received in respect of certain shares, called bonus shares, allotted in respect of the shares that I have already mentioned; and, in the third place, it makes *McKenna* alone responsible in respect of his profits upon a joint or partnership transaction with one *Fox*, as regards 2500 shares. The four Appellants are made severally responsible for their respective profits on these shares, and they are made jointly liable for the whole costs of the suit. From that decree they all appeal.

Now I propose to state in the first place, as shortly as I am able to do, the narrative which alone appears to me material as regards the decree to be made, and the relief which can be given in this suit; and I leave for subsequent consideration the observations which have been made as to the magnitude to which the proceedings in the cause have been swelled, and the costs which have been thereby occasioned.

[His Lordship then concisely stated the facts as given above down to the letters of the 24th of February, 1864, between *Stock* and the board, and continued:—]

Those documents, therefore, contain on the one hand the authority of the board of directors to make with *Stock* a contract of this description, and on the other hand the expression of the terms of the contract with *Stock*.

Now I desire to pause at that point for the purpose of observing that I have entertained some doubt during the argument, and I still entertain some doubt, whether the contract as actually made with *Stock* was altogether warranted by the authority which was conveyed to the directors by the general meeting. But it is not necessary to decide, and I do not desire to decide, the point. I only wish to observe that I entertain doubt upon it; but I will assume for the purpose of what I have to say that the contract with *Stock* in its terms was *intra vires* the directors. What passed afterwards was this: On the 23rd of February the £25,000, the guaranteed deposit, was paid into the joint names of *Stock* and *Lewis*. On the 13th of April another sum of £25,000 was paid into the

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bank. A certain return was made from those two sums, but I will speak of the sums as they were originally paid in round numbers. On the 19th of April 9778 shares, which were the number of shares that ultimately were unaccepted by the old shareholders, or undisposed of to other persons, were allotted to *Stock* in pursuance of the contract with him.

It is necessary at this point to observe what was the position of *Stock* in this matter. The contract at this point was clearly an executory contract. It was a contract of a very peculiar description, running over a considerable time. It was a contract with regard to the performance of which the interests of the bank required to be watched with the greatest jealousy and vigilance. There was the guarantee deposit to be maintained as a guarantee deposit to the end of the transaction; there were the stipulations as to the proportions in which the shares were to be taken up; there was the stipulation that no delivery was to be made until payment was made; there was the approval of the names of persons sent in for shares, which was to come from the directors; and there was the question, of very great importance in a speculation of this kind, how and at what times the calls should be made upon these shares by the directors. The essence, in fact, of the transaction as I view it, and of the bargain with *Stock*, was this, that *Stock* was to take all the risks of the market with regard to the disposal of these shares, and the object to be secured was the fixed payment of £30 a share to the bank. Now I ask the question, In the fulfilment and execution of this contract, who was to watch the interests of the bank? Undoubtedly the directors of the bank. They were the agents of the bank for this purpose. If they did not watch the fulfilment of the contract there was no person else to do it. Their agency would not come to an end with regard to these shares until the contract was completely fulfilled; and their agency at the date which I have referred to, namely, the allotment to *Stock*, not only had not come to an end, but was actually only in reality commencing.

Now that being the position of *Stock* and the position of the directors, I turn next to the narrative of what the directors, or the four Appellants who were directors, actually did in this matter, and I take the narrative from their own words:—[His Lordship

here stated as above the accounts given by the Defendants respectively, as to their taking the shares from *Stock*.]

That is the narrative told in the words of each of the four Appellants themselves, and the conclusion which I draw from it is this, that in the result nearly one-half of the interest of *Stock* was assigned to these four Appellants. It is true that the transaction is throughout called by them a purchase of shares from *Stock*, but *Stock* had no complete property in any shares to sell. All that he could sell, and all that he did sell, appears to me to have been the right to stand in his place *quoad* these 4300 shares, which was the total amount of the shares taken by the four Appellants. It is true that *Stock* was not in any way released from the performance of his contract; but it may be asked how could the directors possibly enforce against *Stock* the performance of the contract *quoad* these 4300 shares, when the enforcing of the contract against *Stock* would, as to those shares, be really the enforcing of it against themselves; for as *Stock* would be liable to the bank, so these four Appellants would be liable each for his own shares to *Stock*.

What happened in the result is just what might have been expected. Very considerable latitude, or even more than latitude, was allowed to *Stock* in the fulfilment of the contract. The strict condition as to the delivery of shares, or rather negativing any delivery until payment, was relaxed—relaxed, I agree, only as to certain parcels and for a certain number of days, but relaxed in that way as to all in turn. The condition as to the guarantee was also relaxed. Entries were made attributing the £25,000 to the shares in such a way as enabled a settling-day to be obtained upon the *Stock Exchange*, but in that way the £25,000 no longer stood in the position in which it stood when it originally was paid in. The shares were given over into the hands of *Stock*, for the purpose of disposal on the market, for a certain number of days, without payment and upon credit; and in fact the question may again be asked, how could it have been possible for the directors to have held *Stock* to the letter of the contract without, at the same time, enforcing the contract in all its rigidity against themselves? They may have been right in the relaxations they made. Those relaxations may or may not have been necessary for the welfare of the bank, and involved in that welfare there may have been the fulfil-

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ment of the contract by *Stock*, but it appears to me that it was utterly impossible for the directors, after the transaction upon which they themselves had entered, to exercise an independent and unbiassed judgment upon the subject of these relaxations. The bank was practically, to a very great degree, running the risk which ought to have been the risk of *Stock* alone; for it is obvious that if the market had fallen very considerably, there would, to say the least of it, have been very great doubt whether the contract could have been fulfilled by *Stock*.

Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. If *Stock* had bought these shares and paid for them, and become the absolute owner of them, the directors were as free as any person in the market to go to *Stock* and to become the purchasers from him of those shares. The agency in that case would have been over, and there would have been no longer any conflict between interest and duty. Here the agency had not terminated. The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the Court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, in my opinion, account to their principal.

These observations dispose of the question with regard to the 4300 shares taken by the four Appellants from *Stock*. The answer to the question as to the bonus shares must be the same as to the 4300 shares, for the bonus shares were allotted in respect of the 4300 shares. I put aside for the moment the remaining question with regard to the 2500 shares which were sold in *Dublin*, and I now pause here again for the purpose of observing that the narrative which I have given up to this time is founded upon documents which are stated in the pleadings, and upon the statements of the Defendants in their answers. With the exception of the few

questions to which I have referred in the cross-examination of Mr. *Vanderbyl*, I have not introduced any element in what I have stated from anything whatever, except from the pleadings in the case, and the question immediately occurs, If this is the case, and if these facts are without dispute, how does it come to pass that we have got here three volumes, of a magnitude seldom seen even in the proceedings of this Court, and nine-tenths of which, to speak within limits, are irrelevant for the purpose of the materials on which I think the judgment ought to proceed? I own that I look with great regret upon the character of the bill, and upon the course which the evidence has taken in this case. I have seldom seen a case which appears to me to occasion greater reproach to the proceedings of this Court; and I think it is a case in which the Court ought to be careful to adjust, as far as it fairly can, the burden of costs which have been occasioned by these, to my mind, most unnecessary and oppressive proceedings.

Now I find the bill, in addition to the facts which I have stated, containing allegations of a long antecedent scheme on the part of these Appellants, or some of them, to create the additional capital which was created in the bank, with the sinister view of becoming themselves possessed of it, or of some of it, and making profit by it; and it attributes to the Appellants a conspiracy to use improperly their power as directors of the bank for the purpose of creating this capital, and for the purpose of allotting it to *Stock*, as to whom it was alleged, to use the expression, I think, of Mr. *Kay*, that they wished him to be as much in their power as possible, in order that they might virtually be the masters of the new capital which was to pass through his hands. For those allegations it appears to me to be due to the Appellants to say that I do not find in the evidence any foundation whatever. I desire to speak of the conduct of these Appellants as it appears to me to deserve. I think they fell into an error, a grave and serious error, in attempting to mix themselves up while they were directors of the bank with this executory speculation of Mr. *Stock*, and for that I think they must suffer. But that was an error into which men might fall from ignorance, from inadvertence, from want of a calm and deliberate observation of the position in which they were placed, and the duties which they had to perform. Nay, more, I can even imagine

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the directors might suppose, although in my opinion their so supposing would be no justification, that their taking some of these shares from *Stock* would be beneficial to the bank, their principals. But conduct of that kind is altogether different from conduct such as is alleged in this bill, which, if founded upon fact, would be conduct deserving of no other name than that of a fraudulent conspiracy to embezzle the property of their employers.

Now, we have been asked in that state of things to say that, even supposing there is a ground for relief upon the basis upon which I have placed it, still that this bill, being such as it is in its charges and in its scope, ought to be absolutely dismissed, and no relief whatsoever ought to be given upon it. I own that it appears to me that that would be a very strange result. Every fact, I repeat, which I have stated as the ground for proper relief is found in the bill and in the answers. If this bill were to be dismissed, it could only be dismissed without prejudice to filing another bill for the purpose of obtaining that proper relief. But it surely would be little less than a mockery to say that this Court, having all the undisputed facts before it, stated upon the pleadings, is obliged, because something else is stated on the pleadings, to dismiss this bill, in order that the cost and expense of another suit, to state over again the same matters, which are not in controversy, should be gone through. I am not aware of any authority which obliges us to adopt such a course: and it appears to me that such a course would be in the highest degree inconvenient, and even irrational. As I understand the rule of the Court on this subject, it is this—that where persons have a case which is alleged upon their bill, and there are also alleged upon that bill other matters, coupled or not coupled with the case, if the allegations can be separated so that relief can be given upon what is stated, it is only a question of costs—what is to be done with that part of the bill which ought to be absent, or which has not been proved?

Now, it appears to me, that that being the rule, it is a rule which ought to be observed to the fulness of its spirit, and that it ought not to be slurred over in a case of this kind, where I find charges of grave and deliberate fraud, which turn out to be entirely without foundation. In my opinion, the course which ought to be taken with a suit so circumstanced is this—that all that part of the bill

which is open to the observations that I have made, ought to be dismissed, and dismissed with costs; and the mode in which I should propose to do that would be by dismissing, with costs, so much of the bill as complains of any acts, or conduct of, or alleges any scheme or fraudulent design of the Defendants, or any of them, anterior to the 19th of April, 1864, which I take as the day upon which the document called the allotment of shares was given to Mr. *Stock*.

I may add to what I have already said, that as regards the power of separating the different cases made by this bill, it appears to me that if the bill is taken from the 164th paragraph to the end, including the prayer, there are alleged with sufficient distinctness two alternative cases, the higher case of fraud, which appears to me to be entirely without proof, and also the case upon which, as it seems to me, the Plaintiff is entitled to relief.

I now turn to the part of the case with which Sir *Joseph McKenna* alone is connected, and which relates to two parcels of shares, one of 1600 and the other of 900. The allegation with regard to these 2500 shares is this, that there was a joint speculation entered upon then in *Dublin* between *Fox*, a broker in *Dublin*, and Sir *Joseph McKenna*, although the shares in form were placed in two other names. That is the allegation on the part of the Plaintiff. The Plaintiff contends that Sir *Joseph McKenna* and *Fox* took these shares from *Stock* at a slight advance over what *Stock* was to pay the bank for them, that they were to share the profits in halves, that profits were made by the re-sale of these 2500 shares, and that Sir *Joseph McKenna* ought to account for his share in those profits. That is the view which is taken by the decree as it now stands. I observe that the Vice-Chancellor felt considerable difficulty in dealing with this part of the case. He felt that he had to decide upon a question of controverted evidence, with the distinct oath, as it seems to me, of Sir *Joseph McKenna* one way, with the statement of *Stock* corroborating Sir *Joseph McKenna*, and with the evidence of Mr. *Fox*, in *Dublin*, the other way, and with a number of letters passing from Sir *Joseph McKenna*, which certainly would at first sight appear rather to favour the view of the Plaintiff than the view of Sir *Joseph McKenna*. The Vice-Chancellor pointed out that some further evidence might have been obtained from the

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account books, which he regretted had not been obtained. Now, if I were obliged to decide this question at this time, I am not at all sure that I should differ from the Vice-Chancellor. But we have been pressed by this consideration, that no specific declaration was asked by the bill upon this point; that the allegations contained in the bill with regard to it might be allegations merely aiming at the general account which was prayed for, and that it is not the habit of this Court at all, unless there is special notice given by a prayer for a declaration on the subject, to decide at the time of the hearing that which may be an item of account. I own it appears to me to be generally very much a matter to be determined in each particular case, whether it is or is not convenient to decide questions which may form items of a general account, and if the case had been entirely ripe for it, I should have thought it convenient in this case to have decided this question. But it appears to me that the case is not ripe for decision. It appears to me that Sir *Joseph McKenna* may fairly say that he was not sufficiently put under notice that it would be decided at the hearing, and it appears to me that there are elements which may still be resorted to for the purpose of obtaining further evidence upon the point. But I wish to say that it seems also to me that this is a part of the case upon which Sir *Joseph McKenna* must take an inquiry at his own risk. If he turns out to be correct in his version of the case, the Plaintiff will be without justification in having made it part of his claim. If, on the other hand, the Plaintiff should turn out to be right in his view of the case, Sir *Joseph McKenna* would be in the position of a Defendant who has, without proper ground, resisted the claim made against him throughout. I think, therefore, that while there ought to be an inquiry in the terms I will presently read, it ought to be understood and expressed upon the face of the decree, that if it turns out that Sir *Joseph McKenna* has had a beneficial interest in these 2500 shares, he must not only account for his share of the profits, but he must bear that part of the costs of the suit, and of the inquiry which relates to these 2500 shares.

Now that disposes, according to my view, of the whole of the case, with the exception of the remaining costs. As to those costs, if the Plaintiff had come here with a bill properly framed

to seek for the relief which I think he is entitled to, and to ask for it upon the uncontroverted facts which I think lead up to his title to relief, and if a bill so framed had been resisted by the Defendants, I should have been of opinion that the Plaintiff would have been entitled not merely to a decree, but to a decree with costs. But I think very different considerations arise when we have to deal with a suit constituted as this is. It is to be observed that if the suit had been framed in the manner which I have indicated, it would have been open to the Defendants, and I think the Defendants would have been advised—certainly they would have been well advised—to have submitted to such a suit, and not to have resisted it. But to a suit constituted like the present, it is impossible for the Defendants to submit. They must resist it; they must meet the allegations of fraud which it contains, and they have no choice but to follow the line on which the Plaintiff may lead them as regards the amount and extent of their proof. I therefore think that it is impossible to deal with the Plaintiff as if he had come here with a suit properly framed, and asking proper relief; and while on the one hand I am not prepared to dismiss the bill because it is overladen with improper and irrelevant matter, on the other hand I am unable to assent to the view that the Plaintiff should be allowed now to remodel his suit in such a way as to carry the costs of the suit, even on the part of it on which he succeeds.

The result of the whole will therefore be that in my view, subject to the opinion of the Lords Justices, the decree as altered would run in this way: "Dismiss with costs so much of the bill as complains of any acts, or conduct of, or alleges any fraudulent scheme or design against the Defendants, or any of them, anterior to the 19th of April, 1864. Declare, first, that the Defendants respectively are trustees for the *National Bank* of all moneys which they respectively received by way of profit from the sale or disposition of any of the 9778 shares in the bill mentioned, and that the Defendants respectively are liable to account to the bank for all such moneys, and for interest thereon at the rate of 4 per cent. per annum, from the receipt by them respectively of such moneys; declare, secondly, that the Defendants respectively are trustees for the bank of all moneys which they respectively re-

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ceived as aforesaid"—that is, by way of profit—"from the sale or disposition of any bonus shares," as the second declaration now stands. Then would come an inquiry whether the Defendant Sir *Joseph McKenna* had any and what beneficial interest in the 1600 new shares of the *National Bank* comprised in the bought and sold notes stated in the 123rd paragraph of the bill, or in the 900 shares in the same bank comprised in the bought and sold notes stated in the 134th paragraph of the same bill; and declare, thirdly, that the Defendant Sir *Joseph Neale McKenna* is a trustee for the *National Bank* for all profits received by him from or by reason of such, if any, beneficial interest, and is liable to account to the bank for all such moneys, and for interest on the amount thereof at the rate aforesaid, from the date of the receipt by him of such profits. Then there will be an account in the form in which it is at present, under the first and second heads, except only and after "received" the words "as aforesaid." Then the decree will continue in this way: "And it is ordered, that in case it shall appear that the Defendant Sir *Joseph McKenna* had any beneficial interest in the 1600 and 900 shares before mentioned, or any of them, then that the Defendant Sir *Joseph McKenna* do pay to the Plaintiff, or other the public officer for the time being of the *National Bank*, so much of his costs of this suit up to and including the hearing as relates to the said 1600 and 900 shares, and the costs of the said inquiry; such costs to be taxed by the Taxing Master." Then nothing will be said as to any further costs.

SIR W. M. JAMES, L.J.:—

I desire to add but little to what the Lord Chancellor has said. I do not think it is necessary, but it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the

agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

There is, however, on the other side a general principle as to the costs of the suit. It is not because a person has made himself liable to proceedings in equity or proceedings at law that the adverse litigant is entitled to make the Court the place, and the proceedings of the Court the means, by which personal spite or party hostility is enabled to indulge itself in unfounded aspersions upon character. In my opinion that has been done here. Unfounded aspersions have been wantonly and recklessly made, and the consequence of that is that this Court is obliged to give effect to what it has so often said it would do—make persons so dealing with the proceedings of this Court pay, and pay fully, in costs for it. I am of opinion, therefore, that the Plaintiff must pay the costs of so much of the proceedings as the Lord Chancellor has pointed out, and that he has so mixed that up with the rest of the suit that he has forfeited, in my opinion, his title to the costs which he otherwise would have been entitled to receive. I am of opinion, therefore, that the decree proposed by the Lord Chancellor is right in both those respects.

I also say for myself that I agree in what has been said with regard to the dealings with the *Fox* shares, that I could not satisfactorily to my own mind have disposed of that part of the case upon the materials before us.

SIR G. MELLISH, L.J.:—

I also entirely agree with the decree which is proposed by the Lord Chancellor. The main question appears to me to depend upon this—how far a trustee or agent for sale is precluded from purchasing from his own purchaser the property which he is entrusted to sell. In my opinion, as long as the contract remains executory, and the trustee or agent has power either to enforce it or to rescind or alter it, as long as it remains in that state he cannot re-purchase the property from his own purchaser, except for the benefit of his principal. It appears to me that that necessarily follows from the established rule that he cannot purchase the property on his own account. There may, of course, be cases of agents for sale who when they have once made the contract

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have concluded their agency, such as the case of an auctioneer—when he has knocked the estate down and made the written contract, it may be said that his agency has terminated. I should suppose that even in that case the Court would look with considerable suspicion on a re-purchase by such an agent as an auctioneer from the person to whom he sold the estate, because it would always be extremely difficult to find out whether there had not been some previous concert and understanding between them. But that is not the case before us. In the case before us it is quite clear that up to the time when the shares were actually registered in the names of *bonâ fide* purchasers from *Stock*, the directors had full power on behalf of the company either to enforce the contract against *Stock*, or to decline to enforce it, or they had power to modify it.

That appears to me to cover the case of all the Defendants. I think it was argued on behalf of Mr. *Vanderbyl* that in May a transaction took place—namely, a loan by the bank to Mr. *Stock*, of the sums which it was necessary for him to pay for the premium and the calls on the shares, the shares being mortgaged by him as security to the bank; and from that time the contract was completely executed. In my opinion that would be no answer of Mr. *Vanderbyl*, because I think the result of the evidence is that he made his contract in the month of April for the purchase of his 500 shares at the same time that the other directors made their contracts. But perhaps with reference to the purchase of the 1600 and 900 shares it may be necessary to consider whether the contract did really cease to be executory on that alleged loan being made. Now, with respect to that, I think there is very slight evidence—it is by no means satisfactory evidence—that those entries were anything more than mere entries in account. But even if they were, it seems to me quite clear that the shares never were at that time completely delivered. If *Stock* had become insolvent, the shares would have remained in the hands of the bank. If he had been unable to complete, and these shares had so fallen that he could not have completed his contract, the shares would have remained in the bank, and it would still have been in their power to sell them or allot them for the benefit of their principals. Therefore, I am clearly of opinion that even in September and

October, the whole contract still remained executory, and that the directors could not be allowed in this Court to purchase any shares from *Stock* except for the benefit of their principals. I also entirely agree with what has been proposed by the Lord Chancellor respecting costs.

Solicitors: Messrs. *Murray & Hutchins;* Mr. *Tahourdin;* Messrs. *Tathams, Curling, & Pym;* Messrs. *W. Tatham & Son.*

OHLSEN *v.* TERRERO.

[1873 O. 3.]

Witness—Evidence—Discretion—Gen. Ord. 5th Feb. 1861, *Rule* 3—*Hostile Witness.*

Where the Judge below has refused leave to have the evidence at the hearing taken *vivâ voce*, the Court of Appeal will not give such leave.

There is no rule that a witness on his examination in chief before the examiner may not be treated as a hostile witness.

Wright v. *Wilkin* (1) observed upon.

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THE bill in this suit was filed to obtain for the Plaintiffs a share in the commission allowed to the Defendants on the negotiation of a loan of £2,000,000 to the Republic of *Paraguay.* The Defendants put in their answers, and the Plaintiffs filed replications. The Plaintiffs then took out a summons for leave to take the evidence in chief as to certain facts and issues *vivâ voce* at the hearing. The Vice-Chancellor *Hall*, in Chambers, refused to make any order on the summons, and the Plaintiffs then moved to the same effect before His Honour in Court. His Honour made no order, and the motion was now renewed before the Court of Appeal.

Sir *H. James*, Q.C., and Mr. *Ince*, in support of the motion:—

Our ground for making this application is that our only witnesses are known to be hostile to us. Under such circumstances it is useless to go before the Examiner, as he will not allow us to ex-

(1) 4 Jur. (N.S.) 804.

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amine our own witnesses as hostile witnesses: *Wright* v. *Wilkin* (1). Our application is under the 3rd rule of the Order of the 5th of February, 1861. The Judge must make the order unless he is satisfied that it is unreasonable, or made for the purpose of delay or vexation. It is not a mere matter for the discretion of the Vice-Chancellor, as the case may come before your Lordships on the evidence so taken.

Mr. *Lindley*, Q.C., Mr. *W. F. Robinson*, Mr. *Cookson*, and Mr. *Dickson*, for the Defendants, were not called upon.

LORD CAIRNS, L.C., after reading 15 & 16 Vict. c. 86, ss. 30, 39, and observing that the mode of taking evidence prescribed by sect. 30 had been altered by the 4th rule of the Order of the 5th of February, 1861, and referring to the 3rd rule, continued:—

Now it is not for us to determine whether the form prescribed is the best form of evidence or not. It is the practice of this Court at the present time; and although we know that the practice is about to be altered, yet the alteration has not come into force. By the 4th rule the negative is laid down that, except as provided in the case of old and infirm witnesses, and except in the special cases mentioned in rule 3, no Plaintiff or Defendant shall have power to require the evidence to be given orally.

Now what is the exception made by rule 3? It is, that in any cause in which issue is joined the Plaintiff or any Defendant may, at a certain time, apply to the Judge in Chambers by summons for an order that the evidence in chief as to any facts or issues which are specified in the summons may be taken *vivâ voce*, and the Judge may make an order that the evidence as to those facts and issues shall be taken *vivâ voce;* but in case the Judge shall be satisfied that such an application is unreasonable, or is made for the purpose of delay, oppression, and vexation, he may refuse to make the order.

The object of this provision is quite manifest, and those who took any part in the construction of these Orders, of whom it was my fate to be one, will remember quite well for what purpose it was made. It was with a view to the administration by a Judge

(1) 4 Jur. (N.S.) 804.

in Chambers; it was proposed that the Judge who had before him the bill and the answer, who possibly had had interlocutory applications in the cause to deal with, and who would have the conduct of the cause until the decree was made, should be the person who, in the exercise of his discretion, should judge whether an exception should be made in that particular case, relaxing the general rule of the Court with regard to the taking of evidence. The wording of the rule is entirely in accordance with that view; it places the decision of the application upon the question whether the Judge in Chambers is satisfied, or is not satisfied. Now, it appears to me that the whole object of the provision would be frustrated, if, after the Judge has pronounced that he is satisfied that the application should not be granted, that is to say, that it is unreasonable, that then there is to be an appeal to this Court, and of course, if to this, also to the House of Lords, upon this which is a question as to which the discretion of the primary Judge alone, as it appears to me, is to be satisfied. I think on that ground, and on that ground alone, it is sufficient to say the application cannot be granted.

Of course, it is entirely in the power of the Court, at the hearing by the Vice-Chancellor, or by any Court of Appeal before which this case may come, if it thinks that justice has not been attained by taking evidence as pointed out by the Orders, to require the *vivâ voce* examination of any of the witnesses.

I should be most unwilling to part with this case without adding that I do not desire to be taken as assenting to the view that it is not in the power of an Examiner of this Court, in the course of an examination of witnesses, to consider whether the witness is or is not hostile, and to allow on the examination in chief a greater latitude in the case of a hostile witness.

The case of *Wright* v. *Wilkin* (1) appears to have come before the Court upon a very unusual and, I should think, irregular application. I take it that the course that would be pursued would be this: if a witness, or his counsel, thought that he was being unfairly dealt with upon an examination, he might refuse to answer a particular question, and upon that refusal the matter might be brought before the Court, who would decide whether the

(1) 4 Jur. (N.S.) 804.

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Examiner was pursuing a proper course or not, in allowing the witness to be treated as a hostile witness. It is, however, unnecessary now to decide that question, and I only refer to it lest I should be thought to have assented to the view that the Examiner is powerless in a case of that kind.

I think, upon the grounds which I have stated, that this motion must be refused with costs.

SIR W. M. JAMES, L.J.:—

I am entirely of the same opinion. I rather think that the Lord Justice and myself dealt with a similar, or at all events an analogous application, and expressed our opinion that these matters of judicial discretion must not be made the subject of appeal, because it would add infinitely to the vexation and expense of Chancery proceedings if upon every decision of a Judge as to the mode in which he thought fit to conduct his own causes, there was to be an appeal here, and then an appeal to the House of Lords.

Solicitors: Messrs. *Brook & Chapman;* Messrs. *Druce, Sons, & Jackson.*

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[1873 P. 198.]

Partition Suit—Sale—Partition Act (31 & 32 *Vict. c.* 40), *s.* 9—*Certificate—Further Consideration.*

20 Eq 538
1 Ch D 54

A decree in a partition suit directed inquiries as to the persons interested, and whether a sale would be more beneficial than a partition, and if so found directed a sale. The sale took place before the certificate was made:—

Held (affirming the decision of *Bacon*, V.C.) that the purchaser was entitled to be discharged, but that the decree was not wrong in directing a sale without reserving further consideration.

THIS was an appeal from an order of Vice-Chancellor *Bacon* by which a purchaser under a sale in a partition suit was discharged from his purchase.

SC As to terms of discharge of a purchaser

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The bill was filed in November, 1873, to obtain a partition of a testator's residuary real estate, or to have the estate sold by the direction of the Court under the *Partition Act*, 1868.

By the decree made on the 23rd of November, 1873, inquiries were directed, including:—

2. An inquiry who are the persons entitled to or interested in testator's residuary real estate, and in what shares and proportions, and for what estates and interests, and whether they are respectively parties to this suit or have been served with this decretal order.

4. Whether any and which of the persons who under inquiry (2) may be found entitled, &c., are out of the jurisdiction.

5. Whether by reason of the numbers of the parties interested in or presumptively entitled to the said residuary estate, a sale of the said residuary real estate and a distribution of the proceeds would be more beneficial for the parties interested than a division of the said estate between or among them. And if it shall appear that such sale would be more beneficial as aforesaid, and that all the parties entitled to, &c., are parties to this suit or bound by the decretal order, it is ordered that the residuary real estate be sold with the approbation of the Judge.

The money to arise by the sale was ordered to be paid into Court to the credit of this cause to an account intituled, &c.; "and for the purposes aforesaid the Chief Clerk is to be at liberty to adopt any finding or certificate made in the suit of *Powell* v. *Powell* [1870 P. 7];" and liberty to apply was given.

The parties interested in the estate (as found in the former suit) were extremely numerous, being the children and issue of the five brothers and sisters of the testator.

By an order in Chambers, dated the 19th of January, 1874, upon the application of the Plaintiff, notice of the decree which, pursuant to 15 & 16 Vict. c. 86, s. 42, r. 8, was required to be served upon certain persons interested who were infants, was ordered to be served upon them by serving their respective mothers, and it was ordered that service of the decree on *B. H. Powell* and *H. W. Powell*, two of the persons interested, who were of full age and out of the jurisdiction, should be dispensed with.

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On the 5th of June, 1874, a portion of the property was put up for sale, with the sanction of the Chief Clerk, and the Respondent Mr. *Umfreville* became the purchaser.

By the certificate of the Chief Clerk, dated the 5th of August, 1874, after stating that the several parties served with notice of the decree had attended by their respective solicitors, and that service of notice of the decree upon *B. H. Powell* and *H. W. Powell* was dispensed with, it was certified that, it appearing that a sale would be more beneficial, the said residuary real estate had been sold in portions on the 5th of June, 1874, and other days previous to the 5th of August, 1874.

Mr. *Umfreville*, the purchaser, applied to be discharged from his purchase, on the grounds:—

1. That the sale had taken place before the Chief Clerk had made his certificate.

2. That *B. H. Powell* and *H. W. Powell*, two of the persons found by the certificate to be beneficially interested, had not been made parties or served with the decree.

Vice-Chancellor *Bacon* was of opinion that the first objection was fatal, and made an order discharging the purchaser, and giving him his costs, charges, and expenses (1). The Plaintiff appealed.

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SIR JAMES BACON, V.C.:—

The objection is little more than formal, as I understand that the certificate has been made, and all parties interested are found; but I consider it to be of the utmost importance to the proceedings of the Court that in these partition cases, and in all other cases where the only power the Court possesses is derived from an Act of Parliament, the provisions of the Act should be strictly complied with.

Now the *Partition Act*—a most useful Act—is as clear in its provisions as it is useful in its operation. Referring to sects. 3 and 5—for the first time in the history of the law the Court is enabled to direct a sale instead of a partition, but the power which is entrusted to the Court is guarded in the most careful way. Then by sect. 9 nothing can be more plain than that the power of the Court to decree a sale depends upon the inquiries just mentioned being exhausted. For what is the meaning of the provision, "Such persons may have liberty to attend the proceedings," unless it means that you shall first ascertain who are entitled, and when you have done that, and ascertained who are, or under any circumstances may justly claim to be, entitled, then, and not till then, you may proceed to sell. That I conceive to be the power, and the only power, that the Court possesses, and there is no power of decreeing a

Mr. *Jackson*, Q.C., and Mr. *Horton Smith*, for the Plaintiff, in support of the appeal:—

We admit that if the Court sells without jurisdiction, a purchaser is not bound; but if the Court has jurisdiction, the sale is not avoided by mere irregularities. *Dykes* v. *Taylor* (1) is a case under the old practice very similar to the present: *Lloyd* v. *Johnes* (2); *Curtis* v. *Price* (3). There is authority in favour of ordering an immediate sale: *Hayward* v. *Smith* (before Vice-Chancellor *Malins*, Feb. 10, 1869); *Lester* v. *Alexander* (before Vice-Chancellor *Malins*, March 13, 1869); *Peters* v. *Bacon* (4).

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sale until the Court is satisfied, either by such evidence as was referred to by Vice-Chancellor *James* in *Silver* v. *Udall* (Law Rep. 9 Eq. 227), or in some other way satisfactory to the judgment of the Court, that the parties whose interests are to be affected by the decree are protected, and that no harm can be done to them, and they may apply if they think fit. Then it is said that the decree in this suit has in some degree trespassed on the provisions of the Act of Parliament, and that a slight invasion of the Act may be justified under what is called the course of the Court. The case of *Dykes* v. *Taylor* (16 Sim. 563), referred to for that purpose, has not the slightest application. That was an administration decree. The trusts of the will were to be executed, and one of the trusts was to sell. It was indifferent who were interested, because they could have no voice in the matter, and therefore the sale may well have taken place before the inquiries were exhausted. But the decree in this case does not go a jot beyond the provisions of the Act, which provides in the most careful manner inquiries as to the persons interested, as to their being out of the jurisdiction or not, and as to incumbrances and all the other things which are necessary; and not until those inquiries are satisfactorily answered is there any power given by this decree to the Chief Clerk in Chambers or to the Court to make the sale. There is nothing in any portion of the 5th inquiry directed by the decree that violates the provisions of the Act of Parliament. The question as to further consideration does not make the slightest difference, being merely a matter of practice. The essence of the thing is that, though now for the first time the Court is entrusted with the power to sell the property of persons not at present ascertained, yet it shall not proceed to do so until it has been ascertained who are entitled, and the decree is quite right, in my opinion, in not reserving further consideration. It is not necessary to say more about it than that, but under the Act of Parliament, in the very terms of this decree, I think the sale that took place before that time at which the Court was empowered to sell had arrived was irregular, and the purchaser who bought under these circumstances is entitled to be discharged from his contract, with his costs, charges, and expenses.

(1) 16 Sim. 563.
(2) 13 Ves. 37.
(3) 12 Ves. 89.
(4) Law Rep. 8 Eq. 125.

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At all events the certificate having since been made, an order confirming the sale would set the matter right.

Mr. *Kay*, Q.C., and Mr. *Nalder*, for the purchaser, were not called upon.

LORD CAIRNS, L.C.:—

This case comes before us under somewhat peculiar circumstances. A decree had been made by Vice-Chancellor *Bacon*, and the Vice-Chancellor, on the construction of his own decree, decided that the decree was right in form, but that there had been a miscarriage in the way in which it had been carried out in Chambers, inasmuch as the sale took place before the inquiry which ought to have preceded it had been made. It is unusual to appeal under such circumstances, and even if I did not agree with the Vice-Chancellor, I should feel a difficulty in interfering with the decision of a Judge as to the mode of carrying into effect his own decree. But I entirely concur in the view of the Vice-Chancellor. The power of selling this estate arises under the *Partition Act*, 1868, and the question before us turns on the 3rd and 9th sections. I do not think that it was the intention of the Legislature, in using in the 9th section the words "on further consideration," to tie up the Court so as to preclude its ordering a sale otherwise than when the cause comes on for further consideration in Court. I should take the words in a popular sense, as referring to any consideration the cause receives after the inquiries have been made. The decree in the present case directs an inquiry who are the persons entitled to or interested in the estate, and in what shares and proportions, and for what estates and interests, and whether they are respectively parties to the suit or have been served with the decree, and also directs an inquiry whether a sale will be more beneficial than a partition, and if it appears that a sale will be beneficial, and that all the persons interested are parties to the suit or bound by the decree, then a sale is to take place. There are two matters on which the mind of the Judge is to be exercised: first, who are the parties interested, and secondly —a question which cannot be properly determined till they are

present—whether a sale will be more beneficial to them than a partition. Here a sale was directed in Chambers before the Judge had his mind brought to these questions. In reply to this, it is urged that a certificate has since been made, finding that the proper parties are before the Court, and that a sale is beneficial; but surely it is not a proper course of proceeding for a sale to be made before the Judge has found who are the parties interested, and that a sale is beneficial to them, and for this irregular order to be afterwards confirmed when the materials without which it ought not to have been made have been obtained. I am therefore of opinion that this appeal must be dismissed. I cannot part with the case without observing upon the direction that "the Chief Clerk" is to be at liberty to adopt any finding in the former suit. I thought that we had got rid in decrees of any recognition of the Chief Clerk as having any independent position. The Chief Clerk has important duties to perform, but he performs them only as the hand of the Judge, who is responsible for the working out of the decree, and who alone ought to be mentioned in the decree as performing them. I hope that this irregular form of direction will not be repeated.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. If Mr. *Jackson's* argument were to prevail, we might come to directing a sale on interlocutory application as soon as the bill was filed, and setting it right by decree.

Solicitors: Mr. *A. R. Steele;* Messrs. *Upton, Johnson, Upton, & Budd.*

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Dec. 17.

LANCEFIELD *v.* IGGULDEN.

[1870 L. 116.]

*Will—Marshalling—Specific Devise—Residuary Devise—*1 *Vict. c.* 26, *s.* 24—*Costs—Plaintiff, a Devisee, claiming also unsuccessfully as a Creditor.*

20 Eq 307
L.R. 6 Eq. 7-8
L.R. 6 Ch. D. 110-1
Appeals 129

A residuary devise of real estate is still specific notwithstanding the 24th section of the *Wills Act*. Therefore, where the personal estate of a testator is insufficient for the payment of his debts, the specific devisees must contribute rateably with the residuary devisee.

The decision in *Hensman* v. *Fryer* (1) on this point followed.

The decision of *Bacon*, V.C., reversed.

The Plaintiff in an administration suit was a specific devisee, and also claimed to be a creditor of the testator. His title as devisee was admitted, but he failed to establish his claim as a creditor:—

Held, that he must pay the costs of his unsuccessful attempt to establish his claim as a creditor.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (2).

George Lancefield, by his will, dated the 24th of November, 1864, devised all his freehold and leasehold hereditaments to the Defendants in trust for his mother, *Elizabeth Lancefield*, during her life; and he declared that, subject and without prejudice to the life interest of his mother, the trustees should stand possessed of certain freehold hereditaments at *Boughton-under-Blean* and in *Canterbury* upon the trusts therein declared for the benefit of his sister, *Ann Corbett*, her husband and children; and of certain other hereditaments in *Canterbury* upon the trusts therein declared for the benefit of his sister, *Mary Brockwell*, her husband and children; and of certain other hereditaments in *Canterbury* upon the trusts therein declared, for the benefit of his sister, *Elizabeth Reynolds*, her husband and children; and of certain other hereditaments in *Canterbury* upon like trusts for the benefit of his niece, *Mary Jane Olifent*, her husband and children; and of certain other hereditaments in *Canterbury* in trust for his nephew, the Plaintiff, for his life, and after his death for his children; and of certain hereditaments at *Wingmore* in trust for the Plaintiff, his heirs and assigns, for ever; and of certain other hereditaments in

(1) Law Rep. 3 Ch. 420. (2) Law Rep. 17 Eq. 556.

Canterbury upon the trusts therein stated for the benefit of his niece, *Selina Lancefield*, her husband and children. And the testator declared that, subject to the life estate of his mother, his trustees should stand possessed of the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments, in trust for his sister, *Eliza Lancefield*, her heirs, administrators, and assigns; and as to all the residue of his personal estates and effects not thereinbefore disposed of, subject to the payment thereout of his debts and funeral and testamentary expenses, the testator gave and bequeathed the same unto *Eliza Lancefield* absolutely.

The testator died on the 17th of February, 1868, and his mother died in April, 1870.

The Plaintiff, besides being a specific devisee under the will, claimed to be a creditor of the testator for £400, and filed the present bill against the trustees for the administration of the real and personal estate of the testator.

The Plaintiff's claim as a creditor was disallowed by the Chief Clerk, and a balance was found due from him of £62 6*s.* 4*d.*; and the personal estate having been found insufficient for payment of the testator's debts, two questions were argued when the cause came on for further consideration, first, whether specifically devised estates were liable to contribute rateably with the residuary real estate to meet the deficiency of the personal estate; and, secondly, how the costs of the Plaintiff's claim as a creditor, which had failed, ought to be borne.

The Vice-Chancellor (1) held that the specifically devised estates were not liable to contribute till the real estate comprised in the residuary devise had been exhausted, and directed that the Plaintiff should pay his own costs of his claim as creditor, but should not pay any of the costs of the other parties. From this decision the Defendants appealed.

Mr. *Miller*, Q.C. (Mr. *Ince* with him), for the Appellant:—

We contend that a residuary devise of real estate is as specific as if the hereditaments comprised in it were specifically mentioned. The 24th section of the *Wills Act* (1 Vict. c. 26) has

(1) Law Rep. 17 Eq. 556.

L. C. and L. J. J. 1874 LANCEFIELD v. IGGULDEN.

made no alteration in this respect. It only enacted that "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator;" but it did not alter the character of the devise in other respects: *Emuss* v. *Smith* (1). It was never intended by that section to alter incidentally the whole law as to the administration of the estates of testators. It is true that the decisions on the question have been conflicting, but the weight of authority is on our side; *Clark* v. *Clark* (2); *Eddels* v. *Johnson* (3); *Pearmain* v. *Twiss* (4); *Edwards* v. *Pugh* (5); *Gibbins* v. *Eyden* (6); *Collins* v. *Lewis* (7); *Jackson* v. *Pease* (8); *Hensman* v. *Fryer* (9). The last-mentioned case, although it has been questioned in *Dugdale* v. *Dugdale* (10) as to one of the points decided therein, has never been overruled as to this point, and is of binding authority on this Court.

With respect to the costs, the Plaintiff has failed in his claim as creditor, on which he founded his suit, and therefore ought to pay the costs occasioned by this claim. He ought to be in no better position than an ordinary creditor.

Mr. *Kay*, Q.C., and Mr. *G. W. Collins*, for the Plaintiff:—

The reason why a residuary gift of personal estate is not specific does not depend upon any rule of law, but upon the fact that inasmuch as a testator's personal estate is constantly changing in amount, he cannot possibly know of what it will consist at the time of his death; and his will is therefore construed on the supposition that he did not intend his residuary legatee to take any specific part of his personal estate, but only what might happen to be left after payment of all his liabilities.

But as to real estate, as the residuary devise under the old law only included what the testator had at the date of his will, there was no fluctuation or uncertainty about it, and the same reason did not apply. That this is the true view is clear from *Forrester*

(1) 2 De G. & Sm. 722.
(2) 34 L. J. (Ch.) 477.
(3) 1 Giff. 22.
(4) 2 Giff. 130.
(5) Ibid. 135, n.
(6) Law Rep. 7 Eq. 371.
(7) Ibid. 8 Eq. 708.
(8) Ibid. 19 Eq. 96.
(9) Ibid. 3 Ch. 420.
(10) Ibid. 14 Eq. 234.

(2) SC 4 Giff 702: 34 LJ Ch 477.

v. *Lord Leigh* (1). It was, therefore, a rule of construction, not of law, which made specific devisees contribute rateably with residuary devisees. And even under the old law it was held that in some cases, as where there was a general charge of debts, the residuary devisee must contribute before the specific devisees: *Mirehouse* v. *Scaife* (2); *Hanby* v. *Roberts* (3); *Spong* v. *Spong* (4). By the 24th section of the *Wills Act* the same fluctuation and uncertainty were introduced with respect to the real estate comprised in the residuary devise, and the same rule of construction ought to apply as in the case of personalty. With respect to the authorities, those of the greatest weight are in our favour: *Tombs* v. *Roch* (5); *Dady* v. *Hartridge* (6); *Bethell* v. *Green* (7).

As to the costs, the Plaintiff did not entirely fail in his claim as creditor, but he was found to be a debtor to a greater amount, and his claim was set off against his debt. On the other hand, the Defendant partially failed in his claim against the Plaintiff, and the Vice-Chancellor thought that the Plaintiff ought not to bear any of the costs of the Defendant.

LORD CAIRNS, L.C.:—

Independently of the state of the law before the *Wills Act*, independently of the *Wills Act*, and independently of the construction of this particular will, I should have thought that in all cases there would have been a very strong presumption of an intention on the part of the testator of this kind: that if a man bequeaths a specific portion of personalty to one person and the residue to another person; and if he devises *Whiteacre* to one person and *Blackacre* to another, and the residue of his real estate to a third, a different conclusion would be arrived at as to his intention with respect to the payment of his debts in the second case to that which would be arrived at in the first case; because it appears to me that, from the well-known habits of mankind, as every one expects to owe some debts at his death, and expects that his personal estate will be the primary fund for payment of his debts, a man who gives a

(1) Amb. 171.
(2) 2 My. & Cr. 695.
(3) Amb. 127.
(4) 3 Bli. (N.S.) 84.
(5) 2 Coll. 490.
(6) 1 Dr. & Sm. 236.
(7) 34 Beav. 302.

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specific legacy to one person and the residue to another may well suppose that the usual rule of law will apply, and that his debts will be paid out of the residue; but that as to the real estate, there being little expectation that the real estate would be resorted to for payment of debts, a man who devises *Blackacre* to one person and *Whiteacre* to another, and the residue to a third, may well be supposed to do so under the belief that he was not only benefiting the specific devisees to the extent of the estates devised to them, but also the residuary devisee to the extent of the residue given to him. But when I look at this particular will, there appear to me well marked reasons for supposing that this view is in accordance with the testator's intention. For the testator having three sisters married and one unmarried, he portions out his real estate among them by giving specific devises to the married sisters and their families, and the residuary real estate to the unmarried sister, and then gives the residue of his personal estate, after payment thereout of his funeral and testamentary expenses and debts, to the same sister. It is impossible not to see that whether the rule of law was present to the testator's mind or not, he anticipated that the residue of the personalty would be the fund out of which the debts would be paid. So far, therefore, as this particular will is concerned, there is nothing to lead us to the conclusion that the residuary real estate was intended to be liable to the debts in preference to the specifically devised estates.

Then as to the question of law. Before the *Wills Act* the rule of law was as well settled as any rule of the Court, that a residuary devise of real estate was treated as specific, and although the items were not specified, it was considered quite as much specific as if they had been specified. The result of this general rule of law was, that after-acquired real estate would not pass under a general devise. Then the *Wills Act* stepped in. It was competent for the Legislature to have said that real estate should be treated like personal estate for all intents and purposes; but this was not done. The provisions of the Act were most carefully framed, not by way of altering philosophically the general rules of law, but by taking each particular evil intended to be cured, and dealing with it separately by particular enactments. The Legislature had to deal with the question of a will passing after-acquired property,

and it has dealt with it by the 24th section. That section enacts that "every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The effect of that is, as Lord *Westbury* on one occasion expressed it, that the Legislature attributed to the will a continuing operation as if the devise were repeated every moment until the testator's death; so that as to all the property it must be taken as if he made it the moment before his death. If we realize this hypothesis of the Legislature, the result is that this residuary devise must be taken as having been made the moment before the testator's death, but as a devise specific in its nature. There is nothing in the Act to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises.

Then with regard to the state of the authorities, it appears that Vice-Chancellor *Kindersley* and the late Master of the Rolls took a different view from that which I have expressed, and that Vice-Chancellor *Stuart*, Vice-Chancellor *Hall*, and Lord *Hatherley*, when Vice-Chancellor, took the opposite view. But I feel bound to say that I look upon *Hensman* v. *Fryer* (1), decided by Lord *Chelmsford*, as a direct decision on this particular point. It was a most carefully considered judgment, and was a distinct expression of opinion by the Judge who was then the head of this Court, that the *Wills Act* had made no alteration in the law in this respect. Therefore, both on principle and authority, I feel bound to come to a different conclusion from the Vice-Chancellor in this case, and his decree must be altered accordingly.

With respect to the other point, the Plaintiff fills the double position of a beneficiary and a creditor, and maintaining his position as a beneficiary, is entitled to his costs in that capacity; but having failed in his claim as a creditor, he ought to pay the costs of that part of the case. He must pay the costs of the Defendants of the proceedings occasioned by that claim, and set them off against such other costs as are due to him.

(1) Law Rep. 3 Ch. 420.

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SIR W. M. JAMES, L.J.:—

I am of the same opinion on both points. I well recollect the decision of Lord *Chelmsford* in *Hensman* v. *Fryer* (1), and the extent to which it was canvassed at the time, and I was never able to see what answer could be made to the principle on which he based his judgment, namely, that the *Wills Act* said that the will was to be construed as if it had been made just before the testator's death, and the Court had only to consider what would have been the consequence if it had been so made.

But independently of that, I think that the decision of Lord *Chelmsford* is binding upon the other branches of the Court. It was a decision deliberately pronounced for the purpose of settling the differences which existed between the various branches of the Court, and I think it ought to have been treated as settling the question.

Solicitors: Messrs. *Monckton, Long, & Co.*; Mr. *J. H. James.*

L. C. and L. JJ. 1875 *Jan.* 20.

PRUDENTIAL ASSURANCE COMPANY *v.* KNOTT.

[1874 P. 184.]

Libel—Injunction—Jurisdiction.

This Court has no jurisdiction to restrain the publication of a libel as such, even if it is injurious to property.

Order of *Hall*, V.C., affirmed.

Dixon v. *Holden* (2) and *Springhead Spinning Company* v. *Riley* (3) overruled.

THE Plaintiffs in this case were a life assurance company carrying on business in *London*, and having an income of above £450,000 a year. The Defendant had lately published a pamphlet on Life Assurance Companies, in which he gave statistics and calculations as to the principal assurance offices, their incomes, rates of premium, expenses of collection, and ratio of assets to liabilities. He commented on the state of several of the companies, amongst

(1) Law Rep. 3 Ch. 420. (2) Law Rep. 7 Eq. 488.
(3) Law Rep. 6 Eq. 551.

which were the Plaintiffs. The Plaintiffs thereupon filed a bill against the Defendant, charging that the effect of certain specified portions of the pamphlet and of the erroneous statements in it as to the rates of premium charged by the company was to represent the company as being managed with reckless extravagance, and as being in a state of insolvency and unable to fulfil its engagements; that that representation was utterly untrue, and that the company's affairs were managed without extravagance; and that the company had been for many years past, and was still, in an exceedingly prosperous and thriving condition, abundantly solvent, and earning large profits. The bill further charged that the continued publication of the pamphlet containing the passages and statements in the bill complained of would be very injurious to the company's credit and reputation, and could not fail greatly to damage the company's business and to diminish its profits derived from it. And the bill accordingly prayed that the publication of the pamphlet might be restrained, and for consequent relief.

The Vice-Chancellor *Hall* refused to grant an injunction, and the Plaintiffs now, by way of appeal, moved for an injunction.

Mr. *Higgins*, Q.C., and Mr. *Phear* (Mr. *Dickinson*, Q.C., with them), in support of the appeal:—

The publication of this pamphlet is a great wrong to the company, and is calculated to injure the company by deterring customers from insuring.

[The LORD JUSTICE MELLISH:—Will not this very application give greater publicity to the libel? If you are injured, bring your action.]

An action would be an altogether inadequate remedy, as the damages could not be assessed; and if this Court cannot interfere, the Plaintiffs have practically no remedy. This Court will always interfere to protect property: *Gee* v. *Pritchard* (1); and the goodwill of a business is a very valuable property. The Court clearly has jurisdiction: *Dixon* v. *Holden* (2). Whenever the property of a company is wronged by a libel this Court can interfere: *Clark* v.

(1) 2 Sw. 402, 413. (2) Law Rep. 7 Eq. 488.

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Freeman (1); *Mulkern* v. *Ward* (2). *Martin* v. *Wright* (3) has no bearing on this case.

[*Emperor of Austria* v. *Day* (4) was also referred to.]

Mr. *Morgan*, Q.C., and Mr. *Ince*, for the Defendant, were not called upon.

LORD CAIRNS, L.C.:—

I am of opinion that there is no ground whatever for the interference of the Court in this case. The Court is asked by an insurance company to grant an injunction to restrain the continued publication of a pamphlet which comments upon the statistical returns of various insurance companies with regard to the comparative expenses of their establishments as compared with their liabilities; and it is said that this pamphlet in those comments draws unfavourable conclusions with regard to the company which are Plaintiffs here, and that the expressions in the pamphlet will be injurious to this company in their trade and business. Now, the comments and expressions in this pamphlet either do amount to a libel upon the company, or do not. If they do not amount to a libel, and are therefore innocuous and justifiable in the eye of a Court of Common Law, I am at a loss to understand upon what principle the Court of Chancery could possibly interfere as a *censor morum* or critic to restrain the publication of statements or expressions which would be held justifiable in a Court of Common Law. If, on the other hand, these comments do amount to a libel, then, as I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which the Court of Chancery will restrain, and those publications, as to which there is a foundation for the jurisdiction of the Court of Chancery to restrain them, will not be restrained the less because they happen also to be libellous.

But apart from the suggestion that the publication here is a libel, I do not observe in the bill any statement or foundation for the jurisdiction of the Court to restrain. I repeat, if the obser-

(1) 11 Beav. 112.
(2) Law Rep. 13 Eq. 619.
(3) 6 Sim. 297.
(4) 3 D. F. & J. 217.

vations are not libellous, they are lawful, and ought not to be restrained; if they are libellous, it is only because they are libellous that the Court of Chancery is asked to restrain them.

It is attempted to give a colour to the application by saying that these are libellous publications which will injure property, and then, when that proposition is further defined, it is said that the business of the company, the goodwill of the company, is property; that the company in its trade will be injured, and that, therefore, the interference of the Court is asked for the protection of property. But with regard to nine out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations, which have an effect upon their character and upon their trade or business, or their character as connected with trade or business; but no case can be produced in which, in those circumstances, the Court of Chancery has interfered. Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction. There are the observations of Lord *Eldon* in *Gee* v. *Pritchard* (1), the observations of Lord *Campbell* in the case of the *Emperor of Austria* v. *Day* (2); there is the *dictum* of Lord *Langdale* in the case of *Clark* v. *Freeman* (3), which stands irrespective of any comments which may be made upon the decision of that particular case; there is the observation of the late Vice-Chancellor of *England* in *Martin* v. *Wright* (4); and there are the observations of the late Vice-Chancellor *Wickens* in *Mulkern* v. *Ward* (5). Over and above those, there is the decision of the House of Lords in *Fleming* v. *Newton* (6), and it is clear to my mind, from reading the opinion of Lord *Cottenham*, whose was the only opinion pronounced in that case, that the whole of it proceeds on one footing. He considered that the case being Scotch, some nicety of Scotch law might be made to appear in the Courts of *Scotland* which would entitle them to interfere with the publication complained of in that case, but that unless some such feature of Scotch law could be shewn, no such interference could, upon the general principles of English law, be permitted.

(1) 2 Sw. 402, 413.
(2) 3 D. F. & J. 217.
(3) 11 Beav. 112.
(4) 6 Sim. 297.
(5) Law Rep. 13 Eq. 619.
(6) 1 H. L. C. 363.

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Now, the only shadow of authority the other way is in the case of *Dixon* v. *Holden* (1), decided by Vice-Chancellor *Malins* in the year 1869. I say nothing about the decision in that particular case, and I do not mean to say that the decision is not capable of being maintained. It professes to proceed mainly upon a case of *Routh* v. *Webster* (2), because I observe that the Vice-Chancellor says (3): "The case of *Routh* v. *Webster* is an authority going the whole length of what is asked here. In that case a joint stock company was established, having for its only object the carrying passengers by steamboat and omnibus at a cheap rate. The Defendants, the provisional directors, had published prospectuses, in which the name of the Plaintiff was used, without his authority, as a trustee of the company. They also paid moneys into the bankers of the company to the Plaintiff's account, as trustee." That case appears, if I may say so, to have been quite rightly decided. The difficulties in which the Plaintiff might have been placed, especially at the time when that case was decided, looking at what was supposed then to be the state of the law as to such undertakings, are obvious; and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorized use of his name. It was upon the authority of that case that the case of *Dixon* v. *Holden* was professed to be decided; but the Vice-Chancellor went further, and said this (4): "The business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say, if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description, which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property. In this case I go on general principle, and I am fortified by authority. General principle is in favour of it, but authority is not wanting." And further on, the Vice-Chancellor says (5): "In the decision I arrive at, I beg to be understood as laying down, that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document which, if permitted

(1) Law Rep. 7 Eq. 488.
(2) 10 Beav. 561.
(3) Law Rep. 7 Eq. 493.
(4) Ibid. 492.
(5) Law Rep. 7 Eq. 494.

to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation." Now, in those opinions the Vice-Chancellor conceived that he was fortified by authority. The authorities cited are, the case of *Fleming* v. *Newton* (1), which appears to me to be an authority exactly to the contrary; the case of *Routh* v. *Webster* (2), which was an authority for preventing the improper use of a man's name against his will; the case of *Clark* v. *Freeman* (3), where the injunction was refused, and where Lord *Langdale* said the Court would not interfere to prevent a libel; and the only other case mentioned, *Springhead Spinning Company* v. *Riley* (4), decided by the Vice-Chancellor himself, upon which of course the learned Judge must be taken to have expressed the same opinion as he expressed in the case of *Dixon* v. *Holden* (5).

I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this Court, and I cannot accept them as an authority for the present application. I think that this appeal must be refused with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion; and I think it is right, this appeal being brought, to express my entire concurrence in the views just stated by the Lord Chancellor. I think that the Vice-Chancellor *Malins*, in that case of *Dixon* v. *Holden*, was, by his desire to do what was right, led to exaggerate the jurisdiction of this Court in a manner for which there was no authority in any reported case, and no foundation in principle. I think it right to say that I hold without doubt that the statement of the law in that case is not correct.

SIR G. MELLISH, L.J.:—

I also am entirely of the same opinion.

Solicitors for the Plaintiffs: Messrs. *Barnard & Co.*
Solicitors for the Defendant: Messrs. *Speechly & Co.*

(1) 1 H. L. C. 363.
(2) 10 ~~Ibid.~~ 561.
(3) 11 Beav. 112.
(4) Law Rep. 6 Eq. 551.
(5) Law Rep. 7 Eq. 488.

L. C.
and L. J. J.
1874
Dec. 17.

MORRICE *v.* AYLMER.

[1874 M. 64.]

Will—Bequest of Shares in Railway—Railway Stock.

A bequest of railway shares will carry railway stock.

A testator who had stock in the public funds, and also stock in a railway company, and partly paid-up shares in the same company, made a bequest of "all such stocks in the public funds or shares in any railway" of which he might die possessed:—

Held (reversing the decision of the Master of the Rolls), that the railway stock passed under the bequest.

Oakes v. Oakes (1) overruled.

THIS was an appeal from a decision of the Master of the Rolls.

G. W. Aylmer, the testator in the cause, made his will, dated the 14th of July, 1853, and thereby, after devising certain real estate, bequeathed as follows:—"I give and bequeath the leasehold premises vested in the trustees of my marriage settlement, and also all other leasehold estates of which I shall be possessed or have power to dispose of at the time of my decease, and also all such stocks in the public funds or shares in any railway of which I may die possessed and that may be standing in my own name, and also all such moneys as I shall have out on mortgage or on any other security bearing interest at the time of my death, whether in *Great Britain* or elsewhere, and also such reversionary property to which I am or may hereafter become entitled, unto my wife for her life, and after her decease to any child or children I may have by her equally as tenants in common." In default of children the testator gave the same leasehold estates, stocks, shares, moneys and securities, and other property, to his brother *Thomas Brabazon Aylmer* absolutely, and he gave all the residue of his personal estate to his wife *Henrietta Aylmer* for her own absolute use and benefit, and appointed her sole executrix of his will.

The testator died in November, 1853, leaving his wife and his brother *T. B. Aylmer* surviving him. He never had any children.

(1) 9 Hare, 666.

At the date of his will and of his death the testator had, besides stock in the public funds, a sum of £6300 stock in the *London and North Western Railway Company*, and sixty-three New Shares of £12 10*s.* each in the *London and North Western Railway Company*, on which £2 10*s.* per share had been paid at the date of his will.

T. B. Aylmer died in July, 1858, having by his will appointed the Defendant, *G. A. Aylmer*, his executor.

Henrietta Aylmer died in February, 1874, having by her will appointed the Plaintiff, *F. F. J. Morrice*, her executor.

The bill was filed for the administration of the estate of the testator, and a question now arose whether the sum of £6300 stock in the *London and North Western Railway Company* passed under the bequest of all the testator's shares in any railway. The Master of the Rolls held that the stock did not pass (1), and the legatee appealed from this decision.

(1) 1874. Nov. 17. WN (1874) 204

SIR G. JESSEL, M.R.:—

I must say that I have a very strong impression that if the testator were alive he would not have approved of my decision. That is mere guessing. I am bound to ascertain the meaning of the words of the will, and not to guess at what the testator's meaning might be. As I have frequently said, I must read this will, and indeed all other wills, grammatically, literally, and in their ordinary sense, unless there is something in the subject-matter and the context to give other than the ordinary meaning.

Here I find a gift of "All such stocks in the public funds or shares in any railway of which I may die possessed." I can find no distinction between "my shares in any railway" and "my railway shares." When I come to the authorities I will shew that no such distinction has ever been suggested. I do not know that one phrase is more accurate than the other of these three: "My railway shares," "my shares in a railway," or "my share of a railway." I cannot say that one is better than the other, or that it better describes the nature of the property. But the will goes on: "and that may be standing in my own name," shewing that he uses the word "share" in a technical meaning; that is, not as an interest in a railway, but something that will stand in his name. It has a technical meaning. It is a share in the capital stock of a railway, which, as we know, may be transferred from one name to another, and may stand in any name. That being so, it is alleged by persons claiming under the gift that the legacies include railway stock. Now, my opinion is, that that point is concluded by authority, and that a gift of railway shares does not include railway stock. I think it has been decided three times; therefore, were my opinion different, I should be bound to decide according to the authorities.

In *Oakes* v. *Oakes* (9 Hare, 666) the very point arose. The words there were, a gift of "all other the railway

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Mr. *Miller*, Q.C., and Mr. *W. Barber*, for the Appellant:—

The Master of the Rolls decided the case on the authority of *Oakes* v. *Oakes* (1), but that decision was based upon the words of the particular will; and, moreover, the consolidation of shares in the form of stock was at that time a new thing, having been introduced by the 8 Vict. c. 16, s. 61. But now that nearly all railway companies have converted their paid-up shares into stock, it is understood by the public generally as only another name for paid-

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shares which I shall be possessed of at the time of my decease." It was held that railway stock afterwards acquired did not pass, but that railway shares afterwards acquired would pass. Therefore, if there is no distinction between "railway shares" and "shares in a railway," *Oakes* v. *Oakes* is an authority in point. That is a decision now a great many years old, and which, standing alone, I should be bound by. But the same point was decided recently twice before Vice-Chancellor *Wood*—once in *Trinder* v. *Trinder* (Law Rep. 1 Eq. 695), in which the gift was "my shares in the *Great Western Railway*," using the word just as it is used here. He evidently was of opinion that *primâ facie* that would not pass stock; but it being a specific gift, it being shewn that the testatrix had no shares in the *Great Western Railway*, but that she had stock in one railway, the dividends of which were paid by the *Great Western Railway*, Vice-Chancellor *Wood* says this: "Railway stock is so analogous to shares in all respects, that on it being clearly shewn that this testatrix had no railway shares at the date of her will, she must be held to have been describing something in her possession so as to pass this stock." Therefore it is clear from this sentence, that if she had had *Great Western Railway* shares, he would not have allowed the stock to pass.

The same point came before him in another way, in the case of *In re Gibson* (Law Rep. 2 Eq. 669). There the testator gave "my one thousand *North British Railway* preference shares" to the amount of £1000. The testator had at the time no preference stock, but he had guaranteed stock and shares, which he sold after making his will. The question was whether the legacy failed. What the Vice-Chancellor said was this: "The gift here was of 'my one thousand *North British* preference shares.' It is true that the testator had not at the date of his will 1000 shares, but £1000 guaranteed stock. But he had nothing else to which the words of the will could be applied, and no one could doubt that this stock was the thing pointed out by the will." There again the Vice-Chancellor says the testator had nothing else, shewing that if he had anything else he would not have held the stock to be included, so that he again holds that the word "shares" will not *per se* pass stock.

[His Honour then referred to an argument which had been based upon the form of the residuary clause, and concluded:—]

The gift of the residue does not throw the slightest light on the meaning of the words used in giving this legacy, and the words I am unable to enlarge. Therefore I must decide that the stock in question did not pass.

(1) 9 Hare, 666.

up shares in joint stock companies, and a person holding stock in a company is usually spoken of as a shareholder. In *Trinder* v. *Trinder* (1) stock in a railway company was held to pass under a bequest of shares.

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for the Plaintiff:—

Oakes v. *Oakes* (2) is a distinct decision that stock will not pass in a bequest of shares if the testator has shares properly so called. In *Trinder* v. *Trinder* the testator had nothing but stock. It is most unreasonable that a different construction should now be put upon the word "shares" simply because there is greater traffic in stock and the word is more loosely used than formerly. Among stockbrokers the distinction is well understood, and no broker, if instructed to purchase stock, would purchase shares. *In re Gibson* (3) is in our favour.

LORD CAIRNS, L.C.:—

With regard to the authorities bearing upon this case, the two latter authorities may, I think, be put out of the question.

In *In re Gibson* the testator had £1000 Guaranteed Stock in the *North British Railway*, and he bequeathed "my one thousand *North British Railway* preference shares." After this he sold his guaranteed stock, and died possessed of shares and stock in the *North British Railway* acquired by several successive purchases exceeding the amount bequeathed to this particular person. It was held that, the bequest being of a specific thing which had been adeemed and was not in the testator's possession at the time of his death, a contrary intention, so as to exclude the operation of the *Wills Act*, sufficiently appeared upon the will, and that the legatee was not entitled to have his legacy satisfied out of the *North British* shares and stock in the testator's possession at the time of his death. The decision, therefore, in that case was that the specific thing which was mentioned when the will was made, namely, the £1000 *North British* Guaranteed Stock, having been sold, was adeemed, and then the words of the 24th section of the *Wills Act* were not sufficient to cause the sum in question to be

(1) Law Rep. 1 Eq. 695. (2) 9 Hare, 666.
(3) Law Rep. 2 Eq. 669.

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given to the legatee. That was the only point actually decided in the case.

Then in *Trinder* v. *Trinder* (1) there was a bequest by the testatrix of "my shares in the *Great Western Railway*." She had no shares at the time she made her will in the strict sense in which it is said the word "shares" should be used, but she had *Wilts and Somerset* Stock of the *Great Western Railway*, and also preference and other stock, which was increased by further purchases of the stock in the same company between the date of the will and her death. Then it was held that all this stock in her possession at the time of her death passed under the bequest. Therefore the bequest there had effect given to it, and nothing else was decided by the Court.

But I own that when I come to the case of *Oakes* v. *Oakes* (2), that is a decision which, if it is to be followed, is precisely upon this point. There were two different subject-matters there in controversy. One was £7000 Consolidated Stock in the *Great Western Railway*, which the testator had in the form of shares when he made his will and which was afterwards converted into consolidated stock; and the second was £8000 Four and a Half per Cent. Stock, in the same company, which he purchased after the date of his will. In his bequest he used these words: "All other the railway shares which I shall be possessed of at the time of my decease." The late Sir *George Turner*, who decided the case when Vice-Chancellor, says this: "I am of opinion that the word 'shares' in this will must be taken according to its ordinary meaning. The testator using this word had at the date of his will shares and stock; the latter could not pass by the force of an expression applicable only to the former. If the testator had at the date of his will railway stock only, and there were nothing properly and strictly to answer the description of railway shares, then the railway stock might have passed by the gift of railway shares. But in this case the testator had shares at the date of his will to satisfy the words which he has used, and you cannot import into the gift another thing that does not answer the description. I must, therefore, declare that the £8000 stock does not pass by the bequest of the railway shares." Now no person could possibly speak with greater respect and

(1) Law Rep. 1 Eq. 695. (2) 9 Hare, 666, 671.

greater admiration for the late Lord Justice *Turner* than myself, and no person would be more ready to distrust any opinion of his own which he found to be in opposition to one deliberately entertained by him; but I make this observation upon the words of this judgment, that it fails to do what very seldom a judgment of Lord Justice *Turner's* did fail to do, namely, to state any reason for the conclusion. The words merely state the conclusion at which Lord Justice *Turner* arrived, and certainly the argument, if it is faithfully reported, does not seem to me to have dwelt very much on this part of the case.

Now it is to be considered what really is the position of railway stock in the present sense and understanding of the term. The *Companies Clauses Consolidation Act* provides by the 61st section, "And with respect to the consolidation of the shares into stock, be it enacted as follows:—It shall be lawful for the company from time to time, with the consent of" a certain majority, "to convert or consolidate all or any part of the shares then existing in the capital of the company, and in respect whereof the whole money subscribed shall have been paid up into a general capital stock, to be divided amongst the shareholders according to their respective interests therein." Now it is to be remembered that this is the first occasion on which this term "stock" was applied by the authority of Parliament to interests in railways. Then, by the 62nd section, it is enacted: "After such conversion or consolidation shall have taken place, all the provisions contained in this or the special Act which require or imply that the capital of the company shall be divided into shares of any fixed amount, and distinguished by numbers, shall, as to so much of the capital as shall have been so converted or consolidated into stock, cease, and be of no effect, and the several holders of such stock may thenceforth transfer their respective interests therein, or any parts of such interests, in the same manner and subject to the same regulations and provisions as or according to which any shares in the capital of the company might be transferred under the provisions of this or the special Act." Then it says that books shall be kept. Then there is to be a register of stock. Then it enacts by the 64th section: "The several holders of such stock shall be entitled to participate in the dividends and profits of the company according to the amount of

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their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, qualification for the office of directors, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any aliquot part of such amount of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages respectively." I need not read further, because that shews the scheme according to which this consolidation of shares into stock took place. It is to be observed that the term "stock," or "capital stock," which is there used, obviously is derived from the consideration that these were what were called joint stock companies, and that "stock" was the short name for "joint stock," and joint stock, in my opinion, is only another name for "shares," because the owner of part of the capital of a company is an owner of a part or a share of the joint stock. The use of the term "stock" appears to me merely to denote that the company have recognised the fact of the complete payment of the shares, and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that stock shall still be the qualification, for example, of directors, who must possess a certain number of shares, and that the meetings shall be of the persons entitled to this stock, who shall meet as shareholders, and vote as shareholders, in the proportion of shares which would entitle them to vote before the consolidation into stock.

If ever there was a case in which the substance is that "stock" and "shares" are identical, it is a case of this kind. It appears to me that the doubt which has arisen, has arisen from the circumstance that it has been supposed, without sufficient attention having been paid to these provisions, that stock in a railway had some sort of analogy to stock in the public funds. It has none whatever. It is possible that debenture stock in a railway company may be said to have some analogy to stock in the public funds, but the joint stock capital of a company is a perfectly

different thing from stock in the public funds. In my opinion, when a man is an owner of stock in a railway, he is properly said to be a shareholder in the company, and would properly call himself a shareholder in the company. As I observed in the course of the argument, a man who owned £100,000 stock in the *London and North Western Railway Company* would be usually said to be a large shareholder in the *London and North Western Railway Company.*

It appears to me that it would be putting a meaning upon the term "shares" so technical as to be in opposition to the ordinary use of the word, if "shares" was held to mean for the purpose of a bequest something different from and something which would not pass stock in a railway company.

The authority, and the only authority, the other way (which, as I I understand in this case, the Master of the Rolls simply followed, treating it as an authority, but not following it from his own judgment,) is the case of *Oakes* v. *Oakes,* an authority, I repeat, for which I have the greatest respect, but I cannot help thinking that the very learned Judge who decided that case, on further argument and consideration, would have seen reason to alter his opinion. Certainly I am unable, sitting here as a member of the Court of Appeal, to follow it. In my opinion, the words used in this will are sufficient to pass the stock in the *North Western Railway Company.*

SIR W. M. JAMES, L.J. :—

I am entirely of the same opinion.

It is necessary to bear in mind that there is no such thing *in rerum naturâ* as a railway share. It is not such a thing as you can see, or touch, or handle. It is a term which indicates simply a right to participate in the profits of a particular joint stock undertaking. Well, then, stock, or that which is called "stock," the thing into which the shares have been consolidated, so far as regards the interest of one person in that stock, is the right to participate in the profits of the undertaking. Both sets of words, "my railway stock," "my railway shares," mean, etymologically, my right to share. Therefore, if you are construing the

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will merely upon etymological considerations, the words of the will are strictly and correctly applicable to the particular subject-matter in question before us. But, generally speaking, it is unsatisfactory to deal with words in common use by etymological considerations. If, then, we add to them the common usage of mankind, I am satisfied that there is not a man who has got an interest in any railway in *England*, speaking merely according to the vernacular which he is accustomed to use, who would ever think of describing a stockholder in a railway otherwise than as a shareholder, or who would think that he was speaking incorrectly in describing his stock as a share in that railway, or a meeting of stockholders as a meeting of shareholders.

I am of opinion, therefore, whatever view is taken of the words of the testator, that he must be considered to use the word "shares" in a sense including all that which gave a right to share in the profits of this particular railway. I quite agree with what the Lord Chancellor said with regard to the cases of *In re Gibson* (1) and *Trinder* v. *Trinder* (2), and also as to the case of *Oakes* v. *Oakes* (3). I also quite agree that we cannot arrive at the conclusion we have arrived at without distinctly overruling the case of *Oakes* v. *Oakes;* but I think we are clearly bound, sitting as a Court of Appeal, taking the view we do of the plain meaning of the words, to overrule that decision.

Solicitors: Messrs. *Collyer-Bristow, Withers, & Russell;* Messrs. *Rogers, Jull, & Rogers.*

(1) Law Rep. 2 Eq. 669. (2) Law Rep. 1 Eq. 695.
(3) 9 Hare, 666.

In re POOLE FIREBRICK AND BLUE CLAY COMPANY.

L. C. and L. J. M.

1875

Jan. 12.

HARTLEY'S CASE.

Company—Paid-up Shares—Registration of Contract—Cancellation of Shares—Agreement with Promoters—Mistake—Companies Act, 1867, *s.* 25.

Certain shares were allotted and accepted as fully paid up in pursuance of a contract with a trustee for the company, which, through inadvertence, had not been registered in accordance with sect. 25 of the *Companies Act*, 1867. Upon discovery of the omission the directors cancelled the shares and removed the name of the allottee from the register, then registered the contract, and subsequently issued fresh shares to the allottee. The company was afterwards wound up:—

Held, that the directors had power to rectify a mistake which was common to them and the allottee, and that the transaction could not be disturbed:

Held, also, that a contract with a trustee for a company, adopted by the company, is within the meaning of the 25th section of the *Companies Act*, 1867.

Order of the Master of the Rolls affirmed.

THIS was an appeal by the official liquidator of the *Poole Firebrick and Blue Clay Company, Limited*, from an order of the Master of the Rolls removing the name of Mr. *Hartley* from the list of contributories in respect of 200 cancelled shares; as reported (1).

The facts of the case are stated in the judgment of the Lord Chancellor.

Mr. *Fry*, Q.C., and Mr. *Chester*, for the Appellant, contended that the directors had no right to cancel these shares. This was not a case of rectifying the register, as in *In re Droitwich Salt Company* (2) or in *In re New Zealand Kapanga Gold Mining Company* (3).

[They referred to *Adamson's Case* (4).]

Mr. *Cracknall*, for the Respondent, was not called upon.

LORD CAIRNS, L.C.:—

The facts of this case, so far as they require to be referred to, are these:—

(1) Law Rep. 18 Eq. 542.
(2) 43 L. J. (Ch.) 581.
(3) Law Rep. 18 Eq. 17, n.
(4) Ibid. 670.

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There was an agreement made with the owner of the land upon which the works of this company were to be carried on, for the sale of the land to certain persons, promoters of the then projected company, and part of the price was to be taken in the shape of paid-up shares in the company. After the company was formed, but before that agreement was registered in the way pointed out by the Act of 1867, 200 of the paid-up shares which had been stipulated for, were, at the request of the vendor, allotted to Mr. *Hartley*, one of the directors of the company; that is to say, the form of allotment was gone through and the certificates were made out. This took place in January, 1871, but in June following notice was taken by the directors, and apparently by the vendor, that the agreement had not been registered according to the Act. The agreement was then registered, the 200 shares were cancelled as having been issued in error, and 200 new shares were issued to Mr. *Hartley*, together with forty more, about which no question as to cancellation is raised.

The official liquidator contends that he has a right to fix Mr. *Hartley* not merely with the 240 shares, but also with the 200 professed to be cancelled.

Now this is not a case in which Mr. *Hartley* is coming here either before or after the winding-up, and is asking the Court to remove his name from the register as having been placed there in error. If such an application had been made after the winding-up, it seems to me that the application could not have been acceded to; if made before the winding-up, and as against the company, he would have to prove his case strictly, and to give evidence of facts which would entitle him to relief on the ground of mistake. But that is not the case here. The directors and Mr. *Hartley*, some years before the winding-up, and apparently in perfect *bona fides*, considered the question, and agreed that it was not the intention of the directors to give, or of Mr. *Hartley* to take, anything except paid-up shares which could legally be allotted as such, and when they found that they had made a mistake they agreed that the shares should be cancelled.

In order to invalidate such a transaction, the official liquidator must shew either that it was not *bonâ fide*, or that there were circumstances which give him a right to undo what was done. But

it appears to me to have been *bonâ fide*, and that it was not incompetent to the directors to cancel the shares and issue new shares.

I may observe that no harm can have been done to any one. No creditor and no shareholder can have been deceived or misled, for no return was made to the Registrar until after the second allotment had been made.

It appears to me that the official liquidator cannot fix Mr. *Hartley* with these 200 shares.

It is hardly necessary to advert to the argument that the 240 shares ought not to be taken as paid-up shares, because the agreement for the sale of the land was not with the company, but with a trustee and before the company was formed. The Act of Parliament does not require the agreement to be with the company, and such agreements are very seldom made with the company directly.

This motion has entirely failed, and must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There was a contract under which Mr. *Boden*, the vendor, was to receive £4800 in paid-up shares; and 200 of these shares were issued at his request to Mr. *Hartley* as paid-up shares. At the time all parties to the transaction thought them paid-up shares, whereas in point of fact they were not paid up. The consequence was that when they discovered their mistake they perceived that Mr. *Boden* had not, in fact, been paid by those 200 shares. It was for the common benefit of all parties that the mistake should be rectified, whether it was a mistake of law made in ignorance of the requirements of the Act, or a mistake of fact as to the agreement being registered; and it was competent to them to rectify the mistake as the transaction was incomplete and Mr. *Boden* was unpaid. This they did by cancelling the shares issued in mistake and by issuing new shares, and such a proceeding was perfectly valid.

This appeal must be dismissed with costs.

Solicitors: Mr. *H. Wickens;* Messrs. *Miller & Miller.*

L. JJ.
1874
Nov. 21, 24.

12 Ch D 375
16 Ch D 624

In re DIXON. *Ex parte* GORDON.

Liquidation—Debt—Proof by Executors of deceased Partner.

By a deed of partnership it was provided that in case of the death of any one of the partners, his share in the capital of the partnership should be taken by the survivors at its value in the books; and that the amount due to the executors of the deceased partner should be paid to them by instalments. One of the partners died, and his executors allowed his share in the capital to remain with the surviving partners at interest. Six years afterwards the surviving partners filed a liquidation petition, there being still in existence debts of the partnership incurred during the lifetime of the deceased partner:—

Held (reversing the decision of *Bacon*, C.J.), that the executors could not prove in the liquidation for the amount due to them from the partnership.

Affirmed by H. of L. 10 App Cas 95.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Peter Dixon, Peter James Dixon, Robert Stordy Dixon, John Dixon, and *Joseph Forster,* carried on business in partnership as cotton-spinners at *Carlisle* and *Manchester,* under the provisions of a deed dated the 13th of April, 1858.

The capital was considered as divided into sixty-four shares, of which *Peter Dixon* was entitled to twenty shares. By the deed of partnership it was provided that the partnership was to continue until dissolved by mutual consent, notwithstanding the previous death of any one or more of the partners. That any partner might retire at any time on giving twelve months' notice in writing to the others. That in case any partner should retire, or should die without having made a valid bequest of his shares under the provisions for that purpose thereinafter contained, the shares of such retiring or deceased partner should be taken by the continuing or surviving partners at their value according to the stock-taking of the 1st of July immediately preceding such retirement or death. That the amount found due to the retiring or deceased partner should be paid by the continuing or surviving partners to the retiring partner, or to the executors or administrators of the deceased partner, by fourteen equal instalments, with interest until payment, and that the punctual payment of such

instalments and interest should be secured by the joint and several bond of the continuing or surviving partners.

Peter Dixon died on the 28th of April, 1866. By his will he empowered his executors to permit his share of the capital of the business to remain in the hands of his partners at interest, and in pursuance of this power his executors allowed his share to remain in the business. No bond was given by the continuing partners.

On the 1st of July, 1868, *R. S. Dixon* retired from the firm.

In the year 1870 two suits were instituted in the Court of Chancery for the administration of *Peter Dixon's* estate, one by the executors, the other by a creditor.

On the 11th of July, 1872, *Peter James Dixon*, *John Dixon*, and *Joseph Forster*, the three continuing partners, filed a liquidation petition. The executors of *Peter Dixon* claimed to prove in the liquidation for the value of his share in the business and interest thereon, and the proof was admitted for the sum of £36,094 7*s.* 8*d.*

The Judge of the *Carlisle* County Court ordered the proof to be expunged, on the ground that there were still unpaid some debts which were contracted by the firm when *Peter Dixon* was a member of it.

The Chief Judge in Bankruptcy held, that the executors were entitled to prove (1).

(1) 1874. July 27. WM (1874) 176

SIR JAMES BACON, C.J.:—

I think the case is reasonably clear, and that the order of the County Court Judge must be discharged. There is no doubt about the general rule in bankruptcy, that a man cannot be permitted to prove in competition with his own creditors; but such is not the present case. This is a case in which, by the contract contained in the partnership deed, when a partner dies his right, or the right of any one in his place, to the actual possession of the partnership property ceases. The executors cannot take the share of the deceased partner, but they are bound to sell it to the continuing partners at the price and on the terms indicated. The valuation fixing the price was made many years ago, so that there is no longer any joint estate in which the creditors are interested, or in which the executors could be interested as continuing partners. The original partner was dead, and there remained nothing but a separate joint estate, if I may so call it, which has been bought and partially paid for by the continuing partners; and the only thing which existed was a debt due from the continuing partners to the executors, just as in *Ex parte Westcott* (Law Rep. 9 Ch. 626). Although it was there called a *devastavit*, it was a debt as between the continuing partner and the executor of the deceased partner—a debt which the continuing partner was perfectly competent to contract, just as much as if

L. JJ.
1874
In re DIXON.
Ex parte GORDON.

The trustee appealed.

Mr. *De Gex*, Q.C., and Mr. *Davey*, for the Appellant:—

A man cannot prove in competition with his own creditors:

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it had been a debt arising upon a bill of exchange or out of the simplest transaction. The executors in the present case are not liable to any joint creditors, but are holders of a right which comes to them under the partnership deed, and are entitled by virtue of that deed to prove. There is no debt on the part of the original partner, for he is dead and gone, and the payment made is by virtue of a contract which had its beginning in his lifetime, but which was ratified and confirmed after his death by the continuing partners. At the moment of his death there could be no question as to the rights of the continuing partners, or that it was in their power to file a bill to enforce the original contract, but such a proceeding did not become necessary. The contract has existed between the executors and the continuing partners ever since without reference to any joint debts; the relation of debtor and creditor has continued to exist between the executors and the continuing partners irrespective of any joint debts. *Ex parte Carter* (2 Gly. & J. 233) was relied upon, but that was a case in which a man lent to his partners on their own personal security certain moneys and took bonds from them as security. The joint estate remained the same, and the partners had separate estate. The lender died in 1817, but the partnership went on, the business being continued down to 1819, when it became bankrupt. Down to the year 1819 the debts were partnership debts, for which the dead man's estate was liable, and it was so held, and also that a proof could not be admitted with respect to the separate bonds in competition with the joint creditors. As to *Ex parte Westcott*, I cannot distinguish that case from this. A *devastavit* no doubt there was, but the only person to whom the debt was due was the receiver appointed by the Court of Chancery in the suit to administer the deceased partner's separate estate. It was a debt, and nothing but a debt, and there were outstanding joint debts due from the firm. I cannot find the slightest distinction between that case and the present. As to *Ex parte Edmonds* (4 D. F. & J. 488), although it was said that it must be assumed that in that case there were no joint debts existing, yet, with all respect, I cannot adopt that suggestion, for I find the attention of the Court was there directed to an entirely different question. If, in the present case, there had been joint estate to administer, that would have made some difference, but it is unnecessary for me to say what. Since 1866, when *Peter Dixon* died, there has existed no joint estate in which his representatives had a particle of interest. The liquidating firm had bought his interest, and in a sense had paid for that which they bought, and it was no longer the capital of *Peter Dixon*. The amount of his share had been ascertained from the preceding stock-taking, and it became a simple debt contracted by means of a purchase. The continuing partners had made the purchase, and no joint estate whatever remained. The Court of Chancery has made a decree for the administration of *Peter Dixon's* estate, and this proof was then made on behalf

Ex parte Carter (1). In *Ex parte Westcott* (2) the partner did not do so. *Ex parte Collinge* (3) is a clear authority, and shews that even if it is for the benefit of the joint creditors the claim cannot be admitted. In *Ex parte Edmonds* (4) all the joint debts had been paid.

Mr. *Marten*, Q.C., and Mr. *Colt*, for the executors of *Peter Dixon* :—

On the death of one partner his executors became merely creditors. In *Ex parte Carter* the executors, in fact, remained partners. *In re Grazebrook* (5) is a clear authority in our favour. *Ex parte Edmonds; Lodge* v. *Prichard* (6). If the contention on the other side was correct, no one could ever retire from a partnership until he was actually paid in cash. *Ex parte Collinge* and *Ex parte Topping* (7) do not apply. *Ex parte Bass* (8) arose out of litigation between the partners: *In re Simpson* (9).

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of that estate, which is distributable under the decree of the Court of Chancery among all his creditors, including those of the partnership. I am satisfied that no wrong can be done by that decree, and that in this liquidation there is a right on the part of his executors to prove and to receive dividends. No creditor who is interested under the liquidation as a joint creditor of the old firm can be debarred from a participation in the benefit of the proof which is made on behalf of *Peter Dixon's* estate. He will have the benefit of any dividends from *Peter Dixon's* estate. I mention that only because I am satisfied that full justice will be done. The ground, however, upon which I decide this case is this—that there is a debt due to the executors wholly separate and distinct from any liability with respect to the joint estate, and which must therefore be absolved from all liability with respect to the joint debts. On the ground that there is no joint estate, and that there is nothing but a plain distinct contract resulting in a debt—a contract plainer than that which existed in *Ex parte Edmonds*—I am of opinion that the proof must be admitted. I am of opinion that this case is not affected in the slightest degree by the authority of *Ex parte Carter*, or any of those cases which have been so often referred to as shewing that a proof cannot be made by a partner against the estate of his co-partner while any of the joint debts remain unpaid. In my opinion it is clear that the executors are entitled to retain their proof for £36,094, and that the order expunging the proof must be discharged.

(1) 2 Gly. & J. 233.
(2) Law Rep. 9 Ch. 626.
(3) 4 D. J. & S. 533.
(4) 4 D. F. & J. 488.
(5) 2 Dea. & Ch. 186.
(6) 1 D. J. & S. 610.
(7) 4 Ibid. 551.
(8) 36 L. J. (Bkcy.) 39.
(9) Law Rep. 9 Ch. 572.

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The true rule is, that a living man shall not prove against his partners; but the case is quite different when he is dead, and his executors are converted into creditors merely. *Ex parte Carter* (1) is the only exception. Our dividend would be about £9000, and the only effect of preventing us from proving will be to hand over a large portion of that to the present creditors of the firm whose debts were not incurred before the death of *Peter Dixon*. The creditors can always come in upon the separate estate of *Peter Dixon*.

Mr. *De Gex*, in reply, said that in *Ex parte Grazebrook* (2) there was a novation, and there were other grounds for that decision.

SIR W. M. JAMES, L.J.:—

I am of opinion, with all deference to the judgment of the Chief Judge, that this case is completely governed by authority to which there is nothing *per contra*—I should say by preponderant authority, if that case of *Ex parte Grazebrook* was an authority the other way; but I think that Mr. *De Gex* has clearly distinguished that case from the case before us.

Now, what Lord *Westbury* decided in *Ex parte Collinge* (3) is, that a partner going out *bonâ fide* (for there was no question of want of *bona fides* in that case), and selling the whole of his share to his other partners for a sum of money, making it a liquidated debt from his former partners to himself, could not claim in respect of that debt against the separate estates of the continuing partners so long as there were joint debts unpaid. This decision was based upon the broad principle, that as the man was himself still liable to pay the debts, he could not prove against the estate against which his own creditors were proving, that is, he could not prove in competition with his own creditors; and this is the rule that has been laid down in those very words as part of the established doctrine of this Court in matters of bankruptcy. Let us take another step. If the partner in that case had died after he had made this arrangement, and instead of making an assignment to trustees for the benefit of his creditors, had made a will and

(1) 2 Gly. & J. 233. (2) 2 Dea. & Ch. 186.
(3) 4 D. J. & S. 533.

appointed executors, is it possible to suggest that the executors, who stand in his place exactly as if he were a living man, could have proved merely by the accident of his death, and though the man himself could not have proved?

Then can it make any difference in point of principle that the debt arose in the lifetime of the man and was not at his death converted into an actual debt through a contract made in his lifetime, by which he, through his legal personal representatives, is the creditor of his partners? And that is the case here. The partner by the deed of partnership made a contract, under which, at his death, his estate becomes the creditor of the surviving partners, they taking the assets; but his estate is still as much liable in equity to the debts of the partnership as if he had survived, or as if he had simply gone out by a voluntary arrangement between himself and his partners. In that case he could not have claimed, and it appears to me that, on principle, it would be impossible to distinguish that case from this. The executors represent him. To the extent of his assets they are liable to the creditors in exactly the same way as he would have been. His estate is still liable, and his estate is the thing which is seeking to claim in competition with his own creditors.

That would be so upon principle, but it seems to me entirely governed by the authority of *Ex parte Carter* (1), which is a very high authority, and has never been, I believe, questioned in this Court. That was precisely a case of executors of a partner who was dead, and it was put upon exactly the same footing. It was there said that they could not claim because there were still debts due from the estate, and that the executors could not claim in competition with their own creditors. It has been endeavoured to be shewn that there were a number of peculiarities in that case—that the estate had not been wound up, and that trading had been going on—but really those circumstances had nothing to do with the *ratio decidendi* of the case. The mere fact that accounts had not been taken to ascertain the amount of the debt did not alter the character of the relation between the executors and the creditors, and that was not a matter with which the creditors had anything to do. It was simply this: The amount of the debt was capable

(1) 2 Gly. & J. 233.

L. JJ. 1874 *In re* DIXON *Ex parte* GORDON.

of being ascertained though it was not ascertained, and the sole ground on which it was held that the executors could not prove was, that they could not prove in competition with persons who had a right to make them pay.

That being the principle adopted in *Ex parte Carter* (1), and acted upon in a very strong case, *Ex parte Bass* (2), and recognised again in the clearest terms by *Ex parte Collinge* (3), we should be unsettling the law of this Court if we were to affirm the judgment of the Chief Judge in this case. The Chief Judge seems to have been of opinion that we had given a decision in the case of *Ex parte Westcott* (4), which in some way conflicts with the authorities to which I have referred. But in that case we were simply dealing with a plain case of a claim by a *cestui que trust* against a trustee who had committed a breach of trust. That was a case which did not appear to be within the words or spirit of the rule. The *cestuis que trust* said, "You have taken our money and spent it, and we call upon you to pay it." We merely held that they were entitled so to call upon the trustee, and that was the simple ground of that decision. It did not appear to me that that case could, by any refined argument, be brought within the principle of *Ex parte Carter*, and we never intended to interfere with the rule which was there laid down. I am of opinion, therefore, that this appeal ought to succeed.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

The rule as laid down by Lord *Eldon* in *Ex parte Sillitoe* (5) is, "That a partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors, shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself."

The question is, whether that rule applies to this case. In substance there are two reasons alleged why it should not apply. First, it is said that the testator's share of the assets was, in com-

(1) 2 Gly. & J. 233.
(2) 36 L. J. (Bkcy.) 39.
(3) 4 D. J. & S. 533.
(4) Law Rep. 9 Ch. 626.
(5) 1 Gly. & J. 374, 382.

pliance with the partnership deed, turned into a debt. But the rule as laid down is not that a partner shall not prove in respect of an unsettled balance of a partnership account against his co-partner who has become bankrupt, but the rule is that a partner in a firm shall not prove at all in competition with creditors of the firm who are in fact his own creditors. And that appears to me to be directly acted upon by Lord *Westbury* in *Ex parte Collinge* (1), where, as in this case, the right of the partner to a share in the assets had been turned into a debt. Therefore I am clearly of opinion that the circumstance of its being turned into a debt, and of his having no longer a right to a share in the partnership assets, makes no difference.

Then it is said that the circumstance of the partner being dead, and this being a proof by the executor, makes a difference. In my opinion that cannot make any difference. That question is what, as I understand, is directly decided in *Ex parte Carter*, and it would be rather extraordinary if it did make a difference, for if you suppose a case where a partner has gone out of a firm and sold his share in the assets to the remaining partners and turned it into a debt—if it is admitted, according to the report of the case before Lord *Westbury*, that he cannot prove—it would be a very extraordinary thing that if he happened to die before or after the partner was made bankrupt, his executors could do what he could not do himself, and that although he himself could not prove until the partnership debts were paid in full, yet that his executors could. Lord *Eldon* says in *Ex parte Carter* (2), "The bankruptcy having occurred, the question arises, whether the executors of *Godwin* have a right to prove that which, as between the remaining partners and *Godwin's* estate, is clearly a debt." That is how Lord *Eldon* treated it, and he clearly thought there was a debt due from the partners to *Godwin's* estate. In addition it was said that a large sum was due on bonds to *Godwin's* estate, although, as far as appears, the account itself had never been taken. He then says, "And the answer is that the estate which they represent is itself debtor to the joint creditors who have proved under the commission, and that the executors therefore

(1) 4 D. J. & S. 533. (2) 2 Gly. & J. 233, 239.

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cannot prove in competition with them—with those who are in fact their own creditors."

What is sought to be done in this case? It is admitted that there are joint debts still remaining to which the estate of *Dixon* is liable in point of law. Therefore he is seeking to prove in competition with his own creditors; and the fact that there are no joint assets of the original firm makes it still more clear that he is so proving, because the question does not arise which sometimes has arisen where there was only a right to prove against the separate estate, whether, if that separate estate was so insolvent that it was impossible there should be a surplus, you could say that he did not prove in competition with the joint creditors. Here, there being no joint estate of the original firm, the proof, as it appears to me, must be against the separate estate, and therefore the executors, if they prove at all, are proving directly in competition with their own creditors; that is to say, with creditors to whom in equity they as the executors are liable.

In my opinion, according to the authorities, it is impossible to say that this proof can be admitted.

Solicitors for the Executors: Messrs. *Pattison, Wigg, & Co.*, agents for Messrs. *Andrews, Barrett, & Andrews, Weymouth.*

Solicitors for the Trustee: Messrs. *James, Curtis, & James* agents for Messrs. *Nanson & Clutterbuck, Carlisle.*

L. JJ. 1874 *Dec.* 12.

Ex parte SPOONER. *In re* SMITH.

Bankruptcy—Execution—Trader Debtor—Notice to Sheriff of Liquidation Petition—Bankruptcy Act, 1869, *s.* 87.

Where the sheriff has sold under an execution the goods of a person who is not evidently a trader, and notice of the filing of a liquidation petition is given to the sheriff under the 87th section of the *Bankruptcy Act*, 1869, it should give such information to the sheriff, that he may identify the debtor with the person whose goods have been sold, and may infer that he is a trader.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

L. JJ.
1874
Ex parte SPOONER.
In re SMITH.

In 1872 *W. Smith*, a farmer, borrowed £1000 from *J. S. E. Mason* without giving any security. On the 26th of February, 1874, *Mason* recovered judgment in an action at law against *Smith* for £1052 18*s.* 10*d.* debt and interest, and £10 1*s.* 10*d.* costs. On the 7th of May *Mason* levied execution on *Smith's* goods upon the judgment. On the 18th of May the sheriff sold the goods which he had seized to *Mason*, by private contract, for £1127 11*s.* 3*d.* *Mason* paid the sheriff by two cheques, one for £1074 4*s.* 3*d.* and the other for £53 7*s.*, the amount of the sheriff's costs and poundage. On the 25th of May the sheriff handed back to *Mason* the sum of £1074 4*s.* 3*d.* in payment of his debt, interest, and costs. On the 1st of June, *Smith* filed a liquidation petition in the *Worcester* County Court, in which he described himself as a farmer, cattle and sheep dealer, and maker and vendor of cattle medicine. On the same day the following notice was served upon the sheriff at the office of his under-sheriff:—

"In the Queen's Bench.

"Between Sir *Edmund Anthony Harley Lechmere*, and others, Plaintiffs, and *William Smith* and *John Smith*, Defendants:

"I hereby give you notice that the said *William Smith*, the above-named Defendant, has this day filed in the County Court of *Worcestershire*, holden at *Worcester*, a petition for liquidation by arrangement or composition with creditors under the *Bankruptcy Act*, 1869.

"Dated this 1st day of June, 1874.

"Yours, &c.,

"*Geo. H. Piper*,

"Attorney in the matter of the said petition."

A similar notice was served on the sheriff in *Mason's* action, but not until the 2nd of June, more than fourteen days after the sale.

The trustee under the liquidation applied to the Court for an order that the sheriff should refund the money he had paid to *Mason*, on the ground that *Smith* was a trader, and that, according to sect. 87 of the *Bankruptcy Act*, 1869, the money ought to have been retained by the sheriff for fourteen days. The debtor was examined, and he stated that in June, 1872, he had commenced

L. JJ.
1874
Ex parte SPOONER.
In re SMITH.

making and selling a cattle medicine which he had invented. There was nothing at his farm to shew that he carried on any trade; but he had extensively advertised the medicine. From other evidence, however, it appeared that he had almost discontinued the sale for some months before he filed his petition, and that he had then only a very small stock on hand.

The Deputy Judge of the County Court ordered the sheriff to pay over again to the trustee the sum which he had paid to *Mason*. The sheriff appealed to the Chief Judge, who discharged the order of the Deputy Judge (1). The trustee appealed from the decision of the Chief Judge.

(1) 1874. Nov. 16. SIR JAMES BACON, C.J.:—

The law under the present Bankruptcy Act with regard to the liability of persons to be made bankrupt as traders, does not differ from the old law, except that, as I think, the present Act has no retrospective operation. The definition of the word "trader" contained in the first schedule to the Act makes such dealing as there was in the present case a trading within the meaning of the Act. But the question before me (and it was the only question which was entertained by the Deputy Judge of the County Court) is whether the sheriff, by acting as he did, has incurred the liability which is imposed by sect. 87. That section is very plain in its terms:—[His Honour read it.] The single question to which my attention must be directed is this, whether the sheriff has so neglected the duty pointed out by this section as to be liable to the penalty—for penalty it is—of paying the money over again. The duty of a sheriff is always difficult and often very hazardous, and in introducing this new law the Legislature has in effect said that, in the case of a trader, the sheriff is to be liable to account to the trustee for the proceeds of the sale under an execution if he has notice within the period of fourteen days after the sale of a bankruptcy petition having been presented against the execution debtor. For this purpose there is no distinction between a bankruptcy petition and a liquidation petition. Is it then in every case the duty of the sheriff to satisfy himself whether the person whose goods he has sold is a trader or not, and, in so doing, to ascertain whether at any previous time the debtor has been engaged in any transactions which may have amounted in construction of law to trading? I think this would be an unreasonable task to impose upon the sheriff. Nor is it necessary that this should be done, for the creditors who seek to avoid the execution ought to give the sheriff such a notice as he can understand. No such notice was given in the present case. The notice which was actually given only told the sheriff that an action was pending against two persons of the name of *Smith*, the commonest of all names. What information did that convey to the sheriff? Then it told him that a liquidation petition had been filed by the above-named Defendant, *William Smith*. It does not say that that Defendant is the same person as the *William Smith* whose goods had been sold, or that he is a trader, but only that a *William Smith* has filed a

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The 87th section of the *Bankruptcy Act*, 1869, makes it imperative on the sheriff to retain the proceeds of the execution for fourteen days, if the debtor is a trader, not if the sheriff knows or believes him to be a trader; he ought, therefore, to retain it in all cases; and if he pays it to the execution creditor before the expiration of the time, he pays it at his own risk. But in this case the notice was sufficient to inform the sheriff that the debtor was a trader; for if he had looked at the indorsements on the writs in Sir *W. Lechmere's* action and in *Mason's* action, he would have seen that the same *William Smith* was Defendant in both actions, and might have fairly inferred that the notice was given because *Smith* was a trader. At all events, there was sufficient to put the sheriff upon inquiry.

Mr. *E. C. Willis*, and Mr. *Julyan Dunn*, for the sheriff, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge was right. It is not necessary to lay down the rule that the notice to the sheriff ought to contain an express declaration that the debtor is a trader; but there must be reasonable information, from which he may infer that fact, given to the sheriff. In this case the notice contained no reference to the particular action in which the execution had taken place, and no particular reference to the debtor by description, but only a reference to a certain action brought by another creditor against a person named *William Smith*. It was said that the sheriff ought to have looked at the indorsements on

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liquidation petition. And the trustee contends that such a notice made it the duty of the sheriff to hold the money, and that by not doing so he has incurred the penalty imposed by sect. 87. I think he discharged his plain duty in paying over the money to the execution creditor, no notice having been served on him such as is required by the Act. In my opinion the notice was not such an one as the statute requires in order to fix on the sheriff the obligation of paying the money over again. Therefore, without saying anything on the other points which have been raised, on this ground alone I think that the order of the County Court must be discharged. But I make no order as to the costs.

L. JJ. 1874 *Ex parte* SPOONER. *In re* SMITH.

the writs. I am of opinion that there was no obligation on the sheriff to do so. The notice ought to be sufficiently clear to shew the sheriff that a petition had been presented by the man whose goods had been sold, and that the proceeds of that particular execution ought not to be dealt with. But telling him that the Defendant in another action had filed a liquidation petition, is not sufficient to make the sheriff liable.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think the notice was calculated to deceive the sheriff. The notice must give the sheriff reasonable information concerning the debtor, some reasonable description who he is, and must contain words by which the sheriff is actually informed, or from which he can infer, that he is a trader. The only information given to the sheriff in this case was that *William Smith*, who had presented a petition for liquidation, was the Defendant in the action of *Lechmere* v. *Smith*. How could he infer from that he was the Defendant in *Mason* v. *Smith*, or that a person who was ostensibly only a farmer had been carrying on a trade? The appeal must be dismissed with costs.

Solicitors for the Trustee: Messrs. *Duignan & Smiles*, agents for Messrs. *F. & H. Corbett, Worcester*.

Solicitors for the Sheriff: Messrs. *Chauntrell, Pollock, & Mason*.

L. JJ. 1874 *Dec.* 12.

Ex parte SCHOMBERG. *In re* SCHOMBERG.

Bankruptcy—Trader—Debtor's Summons—Owner of Phosphate Mine—Bankruptcy Act, 1869, *s.* 6, *sub-s.* 6.

In order to constitute a debtor a trader within the *Bankruptcy Act*, 1869, s. 6, sub-s. 6, he must be a trader at the time when the debtor's summons is served.

The owner of a phosphate mine who sells the phosphate is not a trader within the meaning of the bankruptcy law.

THIS was an appeal from an order of Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

L. JJ.
1874
Ex parte SCHOMBERG.
In re SCHOMBERG.

On the 19th of February, 1874, *A. Beddall* recovered judgment against *T. G. Schomberg* in the Court of Exchequer for the sum of £64 17*s.* 6*d.* for professional services as a solicitor, and £3 8*s.* for costs.

In September, 1874, *Beddall* sued out a debtor's summons against *Schomberg* as a trader for the amount of the judgment debt. The debt not having been paid or satisfied within seven days, *Beddall* filed a petition for adjudication in bankruptcy against the debtor, in which he was described as a trader, founded on the debtor's summons, and he was adjudicated bankrupt accordingly.

The debtor was examined before the Registrar, and stated that on the 19th of February, 1874, he was, and ever since had been, in the employ of the *General Phosphate Company* for working phosphate mines in the South of *France*. The business of the company consisted of getting phosphates out of the ground, making them marketable and selling them, and it carried on no other business. He also stated that before April, 1873, he was a proprietor of the mine, but had then ceased to be so, and had never carried on any business of any kind since that time.

The creditor produced evidence that the debt for which the judgment was obtained was incurred before April, 1873. Under these circumstances, the Registrar was of opinion that *Schomberg* was a trader within the meaning of the 6th sub-section of the 6th section of the *Bankruptcy Act*, 1869 (1), and made the order for adjudication.

From this decision *Schomberg* appealed.

Mr. *Robertson Griffiths*, for the Appellant:—

The proprietor of a phosphate mine is not a trader within the meaning of the bankruptcy laws: *Ex parte Ridge* (2). No alteration in this respect has been made in the *Bankruptcy Act*, 1869,

(1) 32 & 33 Vict. c. 71, s. 6, enumerates among acts of bankruptcy:—

"(6.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due of an amount of not less than £50, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons neglected to pay such sum or to secure or compound for the same."

(2) 1 V. & B. 360.

L. JJ. 1874 *Ex parte* SCHOMBERG. *In re* SCHOMBERG.

Schedule I. Secondly, in order to constitute a debtor a "trader" within the meaning of the 6th sub-section of the 6th section of the Act, he must be a trader at the time when the debtor's summons is sued out. In the present case *Schomberg* had ceased to deal in phosphates since April, 1873.

Mr. *T. R. Bennett*, for the creditor:—

The *General Phosphate Company* was a trading company within the meaning of the Act. The phosphates are not simply dug out and sold, but they have to undergo a manufacturing process before they are saleable. The Act of 1869 has made no alteration as to the time at which acts of trading must have occurred. It is sufficient if the debtor was a trader when the debt was incurred. It is an unreasonable construction of the 6th section of the Act that if a trader has ceased to trade a few days before the debtor's summons is sued out he is not to be treated as a trader.

SIR W. M. JAMES, L.J.:—

The Act says, "The debtor being a trader has for the space of seven days," &c. That must mean a trader at the time when the summons is served. I think the Appellant is right on both points. The adjudication must be annulled.

SIR G. MELLISH, L.J.:—

I am also of the same opinion on both points. I think the debtor must be a trader at the date of the summons in order to be a trader within the meaning of the section.

Solicitors: Mr. *Herbert Wright*; Mr. *Beddall.*

Ex parte TURNER. *In re* TURNER.

L. J. J.
1874
Dec. 3.

Bankruptcy—Practice—Debtor's Summons—Security—Balance of Probabilities of Result of Action—Bankruptcy Act, 1869, s. 7.

Where a debtor's summons is ordered to stand over for an action to be brought, and the Court is of opinion that the probability is as much in favour of the success of the alleged debtor as of the creditor, the Court will not order security to be given.

4 Ch.D. 166
5 Ch.D. 216
13 Ch.D. 266

THIS was an appeal from an order of Mr. *Spring Rice*, sitting as Chief Judge in Bankruptcy, made on a debtor's summons against the Rev. *G. H. Turner*.

The summons was taken out by Captain *Hubback* for the sum of £500, being the balance of a sum of £750 which he had paid to Mr. *Turner* in November, 1873, as the purchase-money of a share in the *Gurtnakelly Slate Quarry* in *Ireland*. Captain *Hubback* alleged that Mr. *Turner*, at the time of the purchase, had no saleable interest in the quarry, and he claimed a return of the money on the ground of failure of consideration. Mr. *Turner* denied the debt, relying on an agreement for final settlement of the transactions between himself and Captain *Hubback* in February, 1874, at which time, as he alleged, Captain *Hubback* had full knowledge of all the circumstances, and received back £250, part of the purchase-money, and gave up the transfer to be cancelled.

On the application to dismiss the summons, both parties filed affidavits, and Mr. *Turner* was cross-examined before the Registrar, who adjourned the summons in order that an action might be brought; but, being of opinion that the probability was in favour of the creditor succeeding in the action, he ordered Mr. *Turner* to give security to the amount of £1000. Mr. *Turner* appealed from this decision.

Mr. *E. C. Willis*, for the Appellant, contended that the Appellant had shewn a *bonâ fide* ground of defence, and therefore that it was not a proper case for requiring security.

L. J. J. 1874 *Ex parte* TURNER. *In re* TURNER.

Mr. *De Gex*, Q.C., and Mr. *Rolland*, for Captain *Hubback*, referred to *Ex parte Lowenthal* (1), where the rule was laid down by Lord Justice *Mellish*, that where there is a question to be tried, and it is not made out to the satisfaction of the Judge that there is a probability that a good defence will be made out, security ought to be required. Here the Judge, in the exercise of his discretion, thought that the probability was against a good defence being made out, and they contended that the facts in evidence justified his conclusion.

SIR W. M. JAMES, L.J.:—

I think that in this case the Registrar did not come to a right conclusion. I think it is not a case in which security ought to be required. It is desirable to avoid prejudicing the trial of the action; but, weighing all the probabilities, I think there is at least as much probability of the Defendant succeeding in his defence as of the Plaintiff succeeding in his action. [His Lordship then referred shortly to the evidence, and directed the order to be discharged as far as it required security to be given.]

Solicitors: Messrs. *Poole & Hughes;* Mr. *P. Roberts.*

(1) Law Rep. 9 Ch. 324.

In re BRAMPTON AND LONGTOWN RAILWAY COMPANY.

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1875
Jan. 12, 14.

SHAW'S CLAIM.

Railway Company—Contract with Promoters—Indemnity.

A solicitor who was promoting a railway company induced various persons to sign the subscription contract, by an assurance that they should incur no liability if the line was not made. Some of these persons were provisional directors. The Act was obtained, and contained the usual clause that the preliminary expenses should be paid by the company. The line was not made. The undertaking was abandoned, and the company ordered to be wound up. The solicitor carried in a claim as creditor for professional services in obtaining the passing of the Act. This claim was opposed by some of the contributories, on the ground of the above assurances:—

Held (affirming the decision of *Bacon*, V.C.), that the solicitor was entitled to prove, for that the assurances made by him could only operate as a contract to indemnify the individuals to whom they were made, and did not exonerate the company in its corporate capacity.

Savin v. *Hoylake Railway Company* (1) distinguished.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *Bacon*, allowing the claim of Mr. *Shaw* as a creditor in the winding-up.

The *Brampton and Longtown Railway* was projected before the year 1865. Messrs. *Dodds & Hendry* were the Parliamentary agents; and Messrs. *Nimmo & McNay*, engineers, Mr. *Shaw*, a solicitor, and Messrs. *Boulton & Jones*, railway contractors, all actively promoted the undertaking. Mr. *Waugh*, Mr. *Dacre*, Mr. *Sutton*, Mr. *Graham*, and Mr. *Thomson*, all of whom were owners of land on the projected line, consented to let their names appear as provisional directors upon receiving from *Shaw* and *Nimmo & McNay* a written guarantee against liability for any expenses incurred prior to the passing of the Act. The usual subscription contract was prepared, and was signed by a considerable number of persons. The Act was passed in 1866, and contained the usual clause that all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing the Act, or otherwise in

(1) Law Rep. 1 Ex. 9.

SC on same p 1 post 186
See also Haughs Case in the same Co
Addams Case 10 20 & 620 V C B

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relation thereto, should be paid by the company. It was found impossible to proceed with the undertaking; the construction of the line was never commenced, and it was abandoned under 30 & 31 Vict. c. 127. In December, 1869, an order was made under 32 & 33 Vict. c. 114, for winding up the company.

The only creditors were four—Mr. *Shaw*, who carried in a claim for £858 5*s.* 6*d.* for professional services; Messrs. *Nimmo & McNay*, who claimed £1000 for engineering work; Mr. *Dodds*, who claimed £879 13*s.* 6*d.* for professional services as Parliamentary agent; and Mr. *Boulton*, who claimed for moneys advanced, and for compensation for loss of the contract which had been entered into with him for making the line.

The claim of *Shaw* having been allowed by Vice-Chancellor *Bacon*, an appeal was brought by fifty-six persons, who, having signed the subscription contract, had been placed on the list of contributories.

The resistance to *Shaw's* claim was on the ground of certain representations made by him, or on his behalf, to some of the persons who signed the subscription contract, and thereby agreed to take shares. Mr. *Waugh*, one of these persons and one of the provisional directors, after stating his refusal at first to sign the contract, proceeded to depose as follows:—

"I afterwards saw the said *W. H. Shaw* in *London*, and had a long conversation with him, when he repeatedly assured me the line would be made, and that I need have no hesitation in signing the contract, which would be of great service both with Lord *Redesdale* and the large companies, and that the same contract, if signed, would not be used or acted on unless the line were made. Upon such representations I at length agreed to place my name on the contract for shares, knowing that the value of my land would more than cover my subscription. The said *William Norris*" (a clerk of *Shaw's*) "at the same time frequently assured me that I should not be called on for a penny unless the line was made; and that the contract was only for the purpose of getting the bill safely passed."

Various persons had signed the subscription contract before Mr. *Waugh* did so, but under what circumstances did not appear.

Mr. *Graham*, another provisional director, deposed "That the said *W. Norris*, amongst other representations made to induce me to take shares and sign the subscription contract, assured me that I should not incur any responsibility whatever by signing the said subscription list; that the sole object was to meet a requisition of Lord *Redesdale*, and shew that the project was supported by persons resident in the neighbourhood through which the line would pass; and that if the scheme was not carried out I should not be called upon to pay one penny of expenses." In a subsequent affidavit he stated: "The said *W. Norris* solicited my signature to a subscription list to take shares in the said company, but I declined to subscribe until positively assured that I should not incur any liability, either as a provisional director or shareholder in respect of the said shares, for expenses, or otherwise, if the undertaking was not carried out."

Mr. *Sutton*, another provisional director, also deposed that he agreed to take shares on the positive assurance of *Norris* that he should not be called upon or be liable for anything whatever unless the line was made.

Carrick and *Lee* stated that they agreed to sign the subscription contract on the positive assurance of *Norris* "that if the undertaking should not be carried out the subscription contract should be considered null and void, and that we should not be called upon to contribute a penny unless the proposed undertaking was carried out." There was evidence to the like effect by some other persons who had signed the subscription contract.

Mr. *Fry*, Q.C., and Mr. *T. L. Wilkinson*, for the Appellants:—

The case is governed by *Savin* v. *Hoylake Railway Company* (1). The persons to whom the representations were made were provisional directors, and the representations were made to them as agents on behalf of the company. But if the engagement was with these persons only as individuals, the result is the same. They were not to be called upon to pay anything, and the persons who made such an engagement with them cannot be allowed to bring a liability upon them indirectly by enforcing payment out of a common fund to which they must contribute.

(1) Law Rep. 1 Ex. 9.

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Mr. *Kay*, Q.C., and Mr. *Smart*, for *Shaw*, were not called upon.

Mr. *Millar*, for the official liquidator.

LORD CAIRNS, L.C.:—

Mr. *Shaw* makes a claim against the *Brampton and Longtown Railway Company*, in its liquidation, for payment for professional services performed by him in respect of the passing of the Act by which the company was incorporated. The railway has been abandoned under the statutory powers enabling a company to abandon a line. The present appeal is not by the official liquidator, but it is by certain persons who are alleged to be and may hereafter be decided to be contributories, and who, *primâ facie* at all events, as being parties to the subscription contract, are shareholders in the company; and they resist this claim, putting themselves in the position of the official liquidator, and in point of fact asking to be heard to do more strenuously what they consider he has not himself done with the energy which he ought to have shewn.

I point out that this is the position of Mr. *Fry's* clients for the purpose of shewing that they cannot advance any argument here for the purpose of resisting this claim which the official liquidator could not advance. They must stand, to all intents and purposes, in his place in resisting the claim; and, therefore, what they must shew is, that Mr. *Shaw* is not entitled, in respect of these professional services, to maintain any claim whatever against the company, for the question is not as to the *quantum* of the claim. Now, if it had been established that Mr. *Shaw*, although he rendered professional services to the company, had, notwithstanding, contracted to hold the company harmless against all claims whatever, including his own, I should have been of opinion that a contract of that kind, whether made with the company directly or made with persons representing the company, for the purpose of its enuring to the benefit of the company, would have been a sufficient answer to the claim made by Mr. *Shaw;* and if the contract had appeared to be, not an absolute contract, in all events and under all circumstances, to hold the company harmless against his own and all other claims, but a contract to hold the company harmless

against these claims if the line should not be made, I should also have been inclined to hold that the line not having been made, that contract would also have been an answer to a claim made by Mr. *Shaw* for his professional services. But, for a contract of that kind to be a defence to such a claim, it is essential that it should be a contract made with the company; because, if allowed as a defence at all, it must be upon the principle, either that Mr. *Shaw* had undertaken, in the event mentioned, not to charge for his work or labour at all, or that, in the same event, he had undertaken to indemnify the company against all claims, in which latter case this Court, to avoid circuity of action, would give effect to the contract of indemnity in the winding-up without putting the parties to an action of indemnity which would in the end result in giving back to the company everything which the company had paid.

But then arises the question whether, assuming the evidence tendered on behalf of the Appellants not to be contradicted, there is in that evidence any proof of a contract to indemnify the company. They put the case in two ways. In the first place it is said that what took place—what was said either by Mr. *Shaw* or by Mr. *Norris* on his behalf to individuals such as Mr. *Waugh*, was said to those individuals, not as individuals, or merely for their own benefit and protection, but for the purpose of its enuring to the benefit of the persons who might take shares in the company, and therefore to the company itself; and in particular, that some of those conversations took place with those who in the subscription contract were entitled to style themselves promoters of the company, and being made with them, the contract was a contract enuring to the benefit of the company. Now, as to this argument, I must say that the conclusion which I draw from the whole of this evidence, after a very careful perusal of it, is that, even if the evidence be accepted as uncontradicted, nothing whatever was said to any of these individuals otherwise than as individuals. What was said was said because individuals were making objections, were demurring to placing themselves under responsibility by signing the subscription contract; and it was said in order to allay the apprehensions of individuals, and to assure them that they, as individuals, would not be called upon to make payments if the

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bill did not pass. That may be a contract to indemnify individuals, but cannot, in my opinion, amount to a contract to indemnify the company. But then the argument was put in another way. It was said that, even assuming what took place to be an engagement with an individual to indemnify him, or rather not to call upon him for payment, inasmuch as that individual could only be called upon for payment by his contribution to a common fund, an engagement not to call upon a contributory to the common fund is virtually an engagement not to call upon any person whatever to contribute to that fund, and is therefore an engagement not to call upon the company to pay. I do not think that is an argument which can prevail. If the words said to be used would actually in law have that effect, it appears to me that, inasmuch as the object of using the words clearly was, in my opinion, merely to allay the apprehension of the individual, the duty of the Court, if there were any doubt about it, would be to mould the words used so that they should not go further than what was intended. If the intention was to protect the individual, and not to indemnify the company, the words, even if amounting to an engagement not to call upon the common fund, which in my opinion they do not amount to, would be read by the Court as an engagement to indemnify the individual who would have to contribute to that common fund.

20 Eq 623

Now, all that I have said proceeds upon this supposition, that the evidence tendered on behalf of the Appellants is to be accepted as uncontradicted, and taken as literally accurate; and, viewing it in that way, which is of course the most favourable way for the Appellants, the evidence, in my opinion, does not amount to anything which would entitle them to say more than that there has been an engagement to indemnify certain persons as individuals. Whether there has been any engagement to indemnify any persons as individuals, I express no opinion whatever. This is not the time nor the place in which that is to be decided. This is a question simply between Mr. *Shaw* and the company; and whether a claim for an indemnity to Mr. *Waugh* or to any other individual can be supported at all upon the facts, whether it can be made and effect given to it in the course of this winding-up, or whether it ought to be made and effect given to it in some other proceeding, it is not

for us now to express any opinion. All these questions we are obliged to leave entirely open. All that, in my opinion, we can do now is to say, there being no question of *quantum*, that Mr. *Shaw* is entitled to maintain his claim for the amount which has been allowed; and that there is no answer to the claim in the arguments urged on behalf of the Appellants.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There appear to be two questions to be determined: one to a certain extent a question of fact, and the other a question of law. Now, the first question is whether, assuming all this evidence which has been brought before us to be true, it is to be considered as establishing that before the Act was obtained an agreement was made by Mr. *Shaw* with any promoter of the company on behalf of the company that he, Mr. *Shaw*, in the event of the line not being made, would not call upon the company to pay any of his costs or charges. The Act of Parliament says that the costs and charges of obtaining the Act are to be paid out of the funds; and although I do not say that an agreement such as in *Savin* v. *Hoylake Railway Company* (1) may not be proved, that a person agreed to give services in obtaining the Act for nothing, yet unquestionably there ought to be very clear evidence to prove that such a contract was made.

I entirely agree with what the Lord Chancellor has said, that here the evidence given on behalf of the Appellants only amounts to this, that at the time when certain individuals signed the subscription contract a representation was made to each of them that he should not himself be put to any charges by reason of his signing the subscription contract unless the line was made.

Now the part of the case which was most strongly relied upon was the contract with Mr. *Waugh*. It was said that this contract with Mr. *Waugh*, he being a promoter, and being one of the provisional directors, was a contract made with him on behalf of the company, intended to enure on behalf of the company if the Act was obtained. It appears to me by the evidence, and Mr. *Waugh's* own statement, to be clear that the contract he obtained,

(1) Law Rep. 1 Ex. 9.

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if he did obtain any, was not one for the benefit of the company, but for his own individual benefit. He says: "I then gave the said *William Norris* a memorandum that I would, in the event of the line being made, take the value of the land in shares. I afterwards saw the said *W. H. Shaw* in *London*, and had a long conversation with him, when he repeatedly assured me that the line would be made, and that I need have no hesitation in signing the contract, which would be of great service both with Lord *Redesdale* and the large companies, and that the said contract, if signed, would not be used or acted on unless the line were made. Upon such representation I at length agreed to place my name on the contract for £250." Now a great number of persons had signed before that. I assume that those persons had signed in the ordinary way, so as to be liable for the expenses if the Act was obtained. Looking at what passed between Mr. *Shaw* and Mr. *Waugh*, assuming that everything Mr. *Waugh* says as to this conversation is perfectly true, it is not to be supposed it was intended to relieve any other persons who had chosen to sign the subscription contract without requiring any indemnity such as Mr. *Waugh* says he got. It appears to me that the utmost conclusion you can come to is that Mr. *Waugh* himself was to be relieved. Indeed it is admitted that to a great extent the contract can only operate by way of indemnity, for that if any other person besides Mr. *Shaw* has a claim against the company for expenses, those expenses must be paid. It is admitted that the persons who signed the subscription contract, and agreed to be shareholders, must be contributories, and that those expenses must be paid out of the calls they pay, and that their only remedy is that they would be entitled to be indemnified by Mr. *Shaw*. So also as regards any expenses for winding up. If it be true that the contract went to such an extent that under no circumstances, if the line were made, could a person with whom it was entered into be put to the expense of one farthing by reason of having signed the contract, that also must be by way of indemnity. So also as to Mr. *Shaw's* own claim. There is nothing in the contract to discharge persons who have agreed to become shareholders in the ordinary way without requiring any indemnity.

Then the only question is a question of law, which was argued

by Mr. *Fry*. He urged that if any one person was discharged, then the whole company might avail themselves of it. I do not at all agree in that. He seemed to think that that was decided by the case of *Savin* v. *Hoylake Railway Company* (1). But in that case there was most clearly alleged a contract on behalf of the company, because what was said was that the plaintiff before the application to Parliament induced certain persons to become promoters of the company upon the faith of an express agreement between the plaintiff and the said persons that he, the plaintiff, would bear and pay all the costs, charges, and expenses of applying for and obtaining and passing the said Act, and in relation thereto; and that neither the said persons, nor the said company when incorporated, nor any other person, should be liable for the charges and expenses to the promoters for the payment to him of the same or any part thereof. It was, therefore, expressly stated, as part of the agreement, that the company when incorporated should not be liable, and the true ground of the decision is plainly this, that the Court, as a matter of construction, held that the words "charges and expenses" in the Act of Parliament did not include charges and expenses which a man had voluntarily incurred on the express agreement that he was not to be paid. It is perfectly impossible to say in this case that the charges and expenses now in question are not within the Act at all, because under certain circumstances it is admitted that they were to be paid; but I would not rely on that, because if there had been an agreement with the promoters on behalf of the company, that in case of the line not being made and of the company being wound up the expenses were not to be paid, although they were to be paid in another event, I think that that contract would have been carried out in the winding-up; but I am not aware of the slightest authority for holding that because any one individual out of twenty subscribers is not to be liable, therefore the other nineteen are to be excused. If the liability were joint, that possibly might be so; but the corporate liability of a company is a totally different thing. There are shareholders who, of course, are not directly liable to the payment of the costs, they are only liable for

(1) Law Rep. 1 Ex. 9.

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the payment of calls to the company. I am not aware of any authority for holding, and in the absence of authority I should not hold, that because a person has agreed that a particular shareholder shall not bear any portion of the charges that he is entitled to have against the company, that therefore the whole company is not liable.

Solicitors: Messrs. *Tahourdins & Hargraves*; Mr. *Joseph Thomson*; Messrs. *Ashurst, Morris, & Co.*

L. C. and L. J. M. 1875 *Jan.* 14.

In re BRAMPTON AND LONGTOWN RAILWAY COMPANY.

SHAW'S CLAIM (No. 2).

Notice to read Evidence—Entering Evidence in Order—Objection to Evidence.

The Appellants from an order on a claim in a winding-up gave notice to read a mass of affidavits made in the winding-up but not used on the hearing below. The Respondent objected to their being admitted, but took copies. The Court of Appeal confined the argument in the first instance to a question not affected by these affidavits, and being against the Appellants on that question, dismissed the appeal with costs, so that the question as to the admissibility of the affidavits was not decided. The Respondent applied to have the affidavits entered in the order, as otherwise he would not be able to get the costs of having taken copies:—

Held, that the application could not be granted, and that the Respondent ought not to have taken copies unless and until the Court held the evidence admissible, in which case it would have given him time to enable him to meet it.

IN this case (1) the Appellant had given notice to read at the hearing of the appeal a mass of affidavits made in the winding-up but not read on the hearing of the claim below. The Respondent *Shaw* objected to their admission, but took copies of them.

On the hearing of the appeal, the Court directed that the argument should in the first place be confined to the point on which the case is reported above. The affidavits being immaterial for the purpose of that argument, the question whether they were

(1) *Ante*, p. 177.

admissible was not decided, the appeal being dismissed with costs without entering into that part of the case to which the affidavits related.

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Mr. *Kay*, Q.C., for *Shaw*, asked for a direction that these affidavits might be entered in the order, as without such direction they would not be entered, nor the costs of taking copies of them allowed.

Lord Cairns, L.C.:—

If notice is given to a party of the intention to read a mass of affidavits to the admission of which he considers himself entitled to object, his proper course is not to incur the expense of taking copies, but to rely on his objection; and the Court, if it overrules the objection, will do what is reasonable in the way of giving him time to meet the additional evidence. You first object to the affidavits being admitted, and then ask to have them entered in the order, which ought not to be done unless they are admissible in evidence. You cannot thus blow hot and cold.

Mr. *Millar*, for the official liquidator, submitted that his costs of taking copies of the affidavits ought to be allowed; for that he being a *quasi*-trustee, it was his duty to furnish his counsel with copies of them.

The Court declined to make any order.

Solicitors: Messrs. *Tahourdins & Hargraves;* Mr. *Joseph Thomson;* Messrs. *Ashurst, Morris, & Co.*

L. JJ.
1875
Jan. 16.

In re WEAR ENGINE WORKS COMPANY.

Winding-up—Company—Petition.

A winding-up order will be refused if a sufficient case for winding up is not stated on the petition, though such a case be proved in evidence.

THIS was an appeal by the company from an order of Vice-Chancellor *Bacon* for winding it up compulsorily on the petition of *James Davison*.

The material statements of the petition, which was presented on the 22nd of July, 1874, for winding up the company, were to the following effect:—

"1. That the company was registered under the Companies Acts on the 6th of September, 1872, without articles."

Paragraph 2 set forth the memorandum of association, which stated the objects of the company to be the purchasing the business of one *Morgan*, an engineer, and the carrying on the business of an engineer, millwright, smith, and boiler-smith. The liability of the members was limited, and the capital £3000, in 30 shares of £100 each.

Paragraph 3 stated the names of the seven subscribers of the memorandum of association.

Paragraph 4 stated the registered office of the company to be the *Pottery Bank, Sunderland.*

"5. The whole of the capital of the company—£3000—has been subscribed and called up.

"6. Your petitioner is the holder of seven shares of £100 each. The whole amount due in respect of your petitioner's said shares has been paid by your petitioner."

7. The operations of the company were carried on from the time of registration till January, 1873, by *John Morgan*, one of the signataries of the memorandum of association, as manager.

8. On the 17th of January, 1873, a meeting was held at which were present *Morgan*, the petitioner, and three others, and at which

a report from the auditors was read, shewing an estimated loss from the 31st of October, 1872, of £57; but as the stock had only been approximately taken on account of pressure of work, it was resolved to adjourn the meeting till the end of the financial year in April, when the stock would be properly taken.

9. In March, 1874, the petitioner was appointed manager of the company.

10. On the 15th of June, 1874, a general stock-taking was taken, and it appeared that there was a loss of £750 upon the carrying on the company's business.

11. On the 19th of June, 1874, a meeting of shareholders was held, and the entry in the minute book of its proceedings was as follows:—

"The balance-sheet and statements were presented to the meeting, when Mr. *Humble* proposed, and Mr. *Crosby* seconded, That the whole of the books and statements, together with receipts and accounts, be submitted to Mr. *H. Graham* for analyzation prior to March last, and a separate statement since that date to the present, in accordance with the requirements of the Act.

"(Signed) *W. H. Crookes*, Chairman."

"12. It is not stated in the said minutes, nor is it the fact, that the said resolution was carried. Nothing has been done with a view of carrying the said resolution into effect.

"13. Since the holding of the said last-mentioned meeting differences have arisen between the directors and shareholders, and he said *W. H. Crookes*, who professes to act as chairman of the company, has placed a bailiff in possession of the company's premises, and the works of the company are now closed.

"14. The persons who profess to act as chairman and directors of the company were not duly constituted as required by the provisions of Table A. in the *Companies Act*, 1862.

"15. The said company has since its formation carried on its business at a loss, which now amounts to upwards of one-third of the capital. No dividend has ever been declared by the said company. No returns have ever been made to the Registrar of Joint Stock Companies of the capital, and particularly of the business

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of the company, as required by the *Companies Acts*, 1862, and 1867.

"16. The company is indebted to your petitioner in the sum of £25 for salary due to him, and is also indebted to sundry other creditors.

"17. Except by the sale of the assets and effects of the said company the said company is unable to pay its debts.

"18. It is just and equitable that the said company should be wound up by this honourable Court."

There followed a prayer for a winding-up order.

On the 14th of November, 1874, Vice-Chancellor *Bacon* made the usual winding-up order. The company appealed. The view taken by the Court of Appeal makes it unnecessary to state the effect of the evidence on both sides, which was very conflicting. It may be noticed, however, that the petitioner deposed in November, 1874, to there being £75 due to him for salary and £35 for disbursements.

Mr. *Higgins*, Q.C., and Mr. *Locock Webb*, for the appeal:—

This petition, according to the expression once used by one of your Lordships, is demurrable. The petitioner does not state a debt of sufficient amount; he does not state that he made a demand, and he does not sufficiently allege that the company is unable to pay its debts. A petition with these defects cannot be supported, whatever be shewn in evidence; but the evidence does not carry the case higher than the statements: *In re London Suburban Bank* (1); *In re London Wharfing and Warehousing Company* (2); *In re Catholic Publishing Company* (3).

Mr. *Kay*, Q.C., and Mr. *Warmington*, for the Respondent:—

It has never been the practice to require the same certainty of allegation in a winding-up petition as in a pleading; it is enough if the evidence shews a case for winding-up, and here the hopeless state of the company's affairs is sufficiently shewn.

(1) Law Rep. 6 Ch. 641. (2) 35 Beav. 37.
(3) 2 D. J. & S. 116.

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SIR W. M. JAMES, L.J.:—

This petition is a demurrable petition. We wish it to be understood that a winding-up petition must allege facts which justify a winding-up order. No doubt, if there is any slip in the statements the Court can allow an amendment, so that the real point may be tried; but, subject to this power of amendment, it is not enough for a sufficient case to be shewn in evidence; a sufficient case must be stated on the petition, that the order may be *secundum allegata et probata*. Here the petitioner alleges only a debt of £25, and does not allege any demand; he, therefore, has no *locus standi* as a creditor. As regards his case as a shareholder, the policy of the Act is to let the shareholders manage their own affairs, and not to interfere except in the special cases mentioned in the Act, none of which are alleged here. Then it is said that the case comes within the general words that it is just and equitable that the company should be wound up. The Court has often had to consider those words, and has always held that they apply only where a case is made of the same description as some of the cases mentioned before, and the equity must be founded on facts alleged in the petition. The order of the Vice-Chancellor must be discharged, and the petition dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Miller & Miller;* Messrs. *Oliver & Botterell.*

L. JJ.
1875
Jan. 16.

In re GORDON (A LUNATIC).

Lunacy—Proceedings to impeach Settlement by Lunatic.

A gentleman made a settlement of nearly the whole of his property in trust for himself for life, and then for four of his five children and their issue. About two years afterwards he was found lunatic. A son who took no benefit under the settlement desired to have it impeached, and adduced evidence shewing that there was reasonable ground for contending that the settlor was of unsound mind when he executed it. The income of the lunatic was amply sufficient for his wants:—

Held, that no proceedings ought to be directed at the expense of the lunatic's estate, but that the excluded son ought to be allowed to file a bill, as next friend of the lunatic, without giving security for costs, to impeach the settlement.

THE question in this case was as to taking proceedings to set aside a voluntary settlement made by the lunatic.

The lunatic was found such by inquisition on the 17th of February, 1874.

The settlement in question was a deed dated the 4th of December, 1871, made between *Thomas Birch Gordon* (the lunatic) of the one part, and *Thomas Birch Gordon, George Lea Malcolm Gordon*, and *Christina Hill*, of the other part, by which, after reciting the title of *Thomas Birch Gordon* to foreign bonds for sums amounting to £16,000, and to a sum of £2000 and upwards at his bankers, *Thomas Birch Gordon* settled the bonds and £2000 of the balance at the bankers upon trust for himself for life, and after his decease, as to so much as would raise £4400 cash, upon trust for *Malcolm Gordon* or his wife and children, as therein mentioned; as to £3000 cash, upon trust for *Christina Hill* during her life, and then for her children, and in default of children, as to one moiety, for the children of *Malcolm Gordon*, and as to the other moiety, in trust for the children of *Ronald Gordon*: and as to £2000 cash, upon trust for *Laura Christina Alison* for life, and then in trust for her two sons; and as to £3000 cash, upon trusts for *Hamilton Gordon* and his wife and issue. The settlor covenanted that if the trust funds should be insufficient to provide the above sums, his executors should make up the defi-

ciency; and if his estate was insufficient to do so, then the beneficiaries were to abate rateably. This deed reserved no power of revocation, and it comprised the bulk of the settlor's property, his whole income being about £947 per annum.

The lunatic's children and next of kin were *Hamilton Gordon, Malcolm Gordon, Ronald Gordon, Christina Hill,* and *Laura Christina Alison.* He was himself a widower of the age of eighty-six.

Ronald Gordon, who, as will be seen, was the only child of the lunatic who took no benefit under the settlement, was desirous of impeaching it, and carried in a proposal before the Master for taking steps to have it set aside.

The Master, by his report, proposed an allowance of £500 a year for the lunatic's maintenance, and £100 a year for the maintenance of Mrs. *Alison,* who had been maintained by her father at an asylum. As to the settlement, he was not of opinion, having regard to the lunatic having a life estate, and to the conflict of evidence, that proceedings ought to be taken to avoid the deed, but he submitted the point to the judgment of the Court.

A petition was now presented by the committee for the confirmation of the report in other respects, and for the direction of the Court as to this deed. *Ronald Gordon* adduced strong evidence to shew that the lunatic was of unsound mind when the deed was executed, which was met by counter-evidence on the part of the other children.

Mr. *Eddis,* Q.C., and Mr. *Graham Hastings,* for the committee, submitted the point to the Court.

Mr. *Jackson,* Q.C., and Mr. *W. W. Karslake,* for *Ronald Gordon,* asked that a bill might be filed to set aside the deed, or a bill to perpetuate the testimony of witnesses as to the settlor's state of mind at the time of its execution. They referred to *In re Tayleur* (1).

Mr. *Karslake,* Q.C., and Mr. *Dauney,* for the other children.

THEIR LORDSHIPS declined to give any directions for trying the

(1) Law Rep. 6 Ch. 416.

L. JJ. 1875 *In re* GORDON (A LUNATIC).

validity of the settlement at the expense of the estate, but considered that as a case was made shewing that there was reasonable ground for impeaching it, any person interested in doing so ought to be allowed to impeach it at his own risk, which their Lordships considered a more proper mode of proceeding than a bill to perpetuate testimony. Leave was accordingly given to *Ronald Gordon* to file a bill, as next friend of the lunatic, to impeach the settlement, their Lordships intimating their opinion that the committee of the estate must be a formal defendant, but ought not to take any part in the contest. Their Lordships also held that the next friend ought not to be required to give security for costs.

Solicitors: Mr. *H. W. M. Jackson;* Mr. *W. H. Oliver;* Messrs. *Hooke & Street.*

L. JJ. 1875 Jan. 18.

In re EMMA SILVER MINING COMPANY.

Winding-up Petition—Cross-examination of Secretary—Production of Company's Books on Cross-examination—Subpœna duces tecum.

11 Ch. D. 258

A petition for winding up a company having been presented by a shareholder, the secretary filed an affidavit in opposition to the petition, and was cross-examined by the Petitioner before a special examiner. On his cross-examination, he was called on to produce the books of the company, which he refused to do. *Malins,* V.C., accordingly, on the application of the Petitioner, made an order that the company, by their secretary, should produce before the special examiner, upon the cross-examination of the secretary, the books and papers which they had had notice to produce:—

Held, that the Petitioner had a right to the production of the company's books and papers on the cross-examination of the secretary for the purpose of testing his evidence, but for no other purpose; and that the order of *Malins,* V.C., was right both in form and substance.

THIS was an appeal from a decision of Vice-Chancellor *Malins.*

On the 6th of October, 1874, a petition was presented by *H. W. Askew* for winding up the *Emma Silver Mining Company, Limited.*

The Petitioner was the holder of 100 fully paid-up shares of £20 each in the company. He alleged misrepresentation in the prospectus and misconduct on the part of the directors, and submitted that the company was a bubble company brought out and

promoted by various schemes and devices to cheat and defraud the Petitioner and others, and that it was for the public good that an examination under the control and direction of the Court should be had into the conduct of the original directors and promoters and the vendors of the mine; and he also submitted that the company was unable to pay its debts.

The secretary of the company, Mr. *W. H. Tooke,* filed an affidavit, in which he denied many of the allegations in the petition, and adduced facts exculpating the present directors. He was cross-examined upon the affidavit, and on his cross-examination was served with a notice to produce the books of the company, which he refused to do.

The Petitioner moved before the Vice-Chancellor that the secretary might be ordered to produce the books on his cross-examination. His Honour made an order to the following effect:—"That the above-named company, by Mr. *W. H. Tooke,* their secretary, produce before the special examiner appointed in these matters, upon the cross-examination of the said *W. H. Tooke* on his affidavit made in these matters on behalf of the said company, and as their secretary, and filed on the 4th of November, 1874, all the books and papers mentioned in the notice to produce dated the 26th of November, 1874, given to the said *W. H. Tooke,* or such of the said books and papers as may be in the possession or power of the above-named company." And His Honour directed the costs to be costs in the winding-up.

From this order the company and Mr. *Tooke* appealed.

Mr. *J. Pearson,* Q.C., and Mr. *Colt,* for the Appellants:—

If this order is regarded as an order in the nature of a *subpœna duces tecum,* it is irregular. The books do not belong to the witness, who is the secretary of the company, nor has he power to produce them. But the order is in fact an order against the company for discovery by production of their books and documents. A shareholder, as such, has no right to inspect the books of the company, and the Court has no power to make such an order on a winding-up petition until an order for winding up has been made, after which an application may be made for production of documents under the 156th section of the *Companies*

(W.R. 1874) 213.

L. JJ. 1875 — *In re* EMMA SILVER MINING COMPANY

Act, 1862. A petitioner in a winding-up petition is not in the same position as a plaintiff in a suit. He must establish his right to an order strictly by his own evidence, and cannot ransack the books of the company to assist him in making out a case. In the present case the Petitioner is a fully paid-up shareholder, and has no *locus standi* to present such a petition, unless he can make out a case of fraud against the company: *In re Lancashire Brick and Tile Company* (1). He has produced no evidence in support of the allegations in his petition except the formal affidavit required by the statute, and he now seeks to supply the deficiency of evidence by searching the company's documents.

Mr. *Cotton*, Q.C., and Mr. *Graham Hastings*, for the Petitioner:—

The Petitioner is not in the position of an ordinary shareholder. He has commenced a litigation against the company, and ought to be in the same situation as if he had filed a bill on behalf of himself and the other shareholders: *Attorney-General* v. *Mercers Company* (2). But in reality, this is not an order for discovery, but simply an order, in the nature of a *subpœna duces tecum*, for the production of the books from which the witness gets his knowledge of the facts he asserts, in order to test his evidence on cross-examination. He is put forward by the company as their mouthpiece, and they cannot refuse to allow his evidence to be tested by their books. We ask no more than would be ordered as a matter of course by the Judge at a trial at *nisi prius*.

Mr. *Pearson*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Vice-Chancellor's order is right in substance, and right also in form—if it is necessary to decide that point. It is not a question of discovery at all. It is an ordinary order for production of documents on the cross-examination of a witness. The judgment of the Vice-Chancellor seems in some passages to treat the question as one of discovery. But Mr.

(1) 34 Beav. 330. (2) 9 W. R. 83.

Cotton relied on the order as really made and drawn up, which is simply an order for the production of documents on the cross-examination of a witness. The power of making such an order exists in this Court in the same manner and with the same restrictions as in a Common Law Court in an action at *nisi prius*. A witness having been called, it is desired to test his evidence by cross-examination, and for that purpose it is desired to put in his hand books, papers, and documents, either in his own control or in that of the party to the cause in whose behalf he is examined. The Vice-Chancellor has made an order in this case, that the books must be produced that they may be dealt with as if before a Judge and jury at *nisi prius*. It is clear that there is to be a limit to the power of inspection: a person must not read them for his amusement, but they are to be dealt with as at a trial at *nisi prius*. That is the nature and the limit of the right of the Petitioner under this order. The order is right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is impossible to say, as we must say if we allow this appeal, that none of the books can be of any use in the cross-examination of this witness. In his affidavit he has sworn to some things which he cannot know except from the books. He is cross-examined as to them; he appeals to the entries in the books. It is idle to contend that what he has said is not to be tested by the books. The Petitioner is entitled, on his cross-examination, to have the books there; but to what extent he is entitled to use them cannot be decided till the course of the cross-examination is known.

Solicitors: Messrs. *Sale, Turner, & Knight;* Messrs. *Harper, Broad, & Battcock.*

L. JJ.
1875
Jan. 18.

In re BARNED'S BANKING COMPANY.
Ex parte JOINT STOCK DISCOUNT COMPANY.

Securities for Bills of Exchange—Double Insolvency—Doctrine of Ex parte Waring—Application of Securities—Reduction of Proof.

All the parties to certain bills of exchange, the payment of which was secured as between some of them, became insolvent—one of them (a company) being ordered to be wound up. The securities were realized, and the proceeds paid to the bill-holders, upon the principle of *Ex parte Waring* (1). After the bills had matured, but before the securities were realized, the holders had proved against the company for the full amount:—

Held (affirming the decision of the Master of the Rolls), that the proof must be reduced by the amounts received by the bill-holders from the securities, and any dividends received on the excess of the original over the reduced proof must be refunded.

THIS was an appeal from a decision of the Master of the Rolls (2).

The question arose on an application by the *Joint Stock Discount Company* that certain sums might be paid to the *Joint Stock Discount Company* by the liquidators of *Barned's Banking Company*, as further dividends on certain bills of exchange which had been proved in the winding-up of *Barned's Banking Company*.

The bills in question had been indorsed by (amongst other persons) *Barned's Banking Company*, and the payment thereof had been secured by mortgages of one or other of the following ships: the *Juventa*, the *Gambia*, the *Lady Rowena*, the *British Princess*, and the *Queen Victoria*. In every case, the drawers, acceptors, and indorsers of the bills had become insolvent, and the bills having come to maturity had been proved against the estates of all of them by the holders. The claims of the holders had been satisfied partly out of the proceeds of the sale of the ships, and partly by dividends paid by the liquidators of the *Joint Stock Discount Company*. This company, which was now in liquidation, had indorsed the bills subsequently to the indorsement of *Barned's Banking Company*, and had now become entitled to the benefit of the proofs against the drawers, acceptors, and prior indorsers of the bills.

(1) 19 Ves. 345. (2) Law Rep. 19 Eq. 1.

The particulars of the mortgages of the various ships are given in detail in the previous report.

Neither the *Joint Stock Discount Company* nor the parties to whom they had indorsed the bills took any transfer to themselves of the benefit of any of their securities. The payments to the bill-holders out of the proceeds of the securities were all made after proof.

The liquidators of *Barned's Banking Company* insisted that the proofs in respect of the bills now held by the *Joint Stock Discount Company* ought to be reduced by the amounts paid to the bill-holders out of the proceeds of the sale of the ships; and they had paid to the *Joint Stock Discount Company* dividends on the amount of the proofs so reduced. The *Joint Stock Discount Company*, on the other hand, claimed to be entitled to receive the dividends on the full amount of the proofs.

The Master of the Rolls refused to allow the claim; and the *Joint Stock Discount Company* appealed from this decision.

Mr. *Romer* (Mr. *Roxburgh*, Q.C., with him), for the Appellants:—

We do not come strictly under the rule of *Ex parte Waring* (1), but under the equitable doctrine laid down in *Powles* v. *Hargreaves* (2) and *City Bank* v. *Luckie* (3). These payments must either be treated as made on account of securities of the bill-holders, or as voluntary payments. If the securities were the securities of the bill-holders, we come under the rule that in Chancery and in winding-up a creditor may receive payments in respect of the realization of a security after proof, without reducing the amount of his proof. The cases relied on by the other side, *Coupland's Claim* (4) and *Banner* v. *Johnston* (5), are distinguishable, for in both of them the creditor who proved was party to a security which provided that the debtor was only to be liable for the difference between the debt and the proceeds of the property comprised in the security. Here, neither the *Joint Stock Discount Company* nor the parties who proved have entered into any such contract.

(1) 19 Ves. 345.
(2) 3 D. M. & G. 430.
(3) Law Rep. 5 Ch. 773.
(4) Ibid. 167.
(5) Law Rep. 5 H. L. 157.

L. JJ. 1875

In re BARNED'S BANKING COMPANY. *Ex parte* JOINT STOCK DISCOUNT COMPANY.

It is therefore more correct to treat what they received as voluntary payment: and even in bankruptcy a proof is not reduced in consequence of such a payment.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for *Barned's Banking Company*, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls in this case is quite right. His decision is this, that the case is governed by *Ex parte Waring* (1), that is to say, that the bill-holder was entitled to the benefit of the security which he had not got himself, and as to which he had made no contract. The case of *Ex parte Waring* is now settled by this Court. It is a case, I may say, *positivi juris*. It is an actual decision, and is the authority by which the Court has been governed ever since, both in bankruptcy and equity.

That case decided that a bill-holder is entitled to the benefit of the security upon these terms—that the security is to be applied *ab initio* in reduction of the debt from which he gets by good fortune this benefit. That is what was done in *Ex parte Waring*, and in every one of the other cases. The Master of the Rolls says, in effect, in this case: "If I apply *Ex parte Waring* for the benefit of the bill-holder, the bill-holder must take it with the limitation and under the conditions expressed in the order in *Ex parte Waring*, that is to say, the security is to be considered as having been applied in the first instance." I have no disposition myself to give a bill-holder any further benefit from that than he has already obtained under it.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. It appears to me that if any other rule prevailed, we should be taking away from the persons who really owned the security the value of it. As it is, they only get it very imperfectly, but still, to a certain extent, they do get it by the diminution of the sum which may be proved

(1) 19 Ves. 345.

against the estate. If it were not to be diminished, it might wholly, in some cases, be given to the bill-holder, and taken away from them altogether. It is entirely a question, as the Master of the Rolls says, turning upon the terms on which the Court will allow the bill-holders to have the proceeds of the security. I am clearly of opinion they ought only to be allowed to have it upon the terms of the proof being reduced. The appeal must be dismissed with costs.

Solicitors: Mr. *W. Trinder;* Messrs. *Freshfields & Williams.*

In re CRABTREE'S SETTLED ESTATES.

Settled Estates Act—Person of Unsound Mind not so found—Service under Settled Estates Amendment Act (37 & 38 *Vict. c.* 33), *s.* 2.

A person of unsound mind, not so found by inquisition, whose consent is required to a petition under the *Settled Estates Act*, may be served with a notice under the 2nd section of the *Settled Estates Amendment Act*, 1874. Such notice should be served on the person of unsound mind personally, and also on the person in whose care he is.

4 Ch D. 88

IN this case a Petition was presented under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), praying that a lease of certain houses in the City of *London*, settled by the will of *James Crabtree*, dated the 10th of January, 1784, might be carried into effect by the Court.

The Petition was presented by all persons whose consent was required by the Act, except two persons who were of unsound mind, not so found by inquisition, and who were made Respondents. The Respondents were both confined in lunatic asylums.

The Petitioners took out a summons for the appointment of a guardian for the Respondents for the purpose of consenting to the prayer of the Petition, but the order was refused on the authority of *In re Clough's Estate* (1).

The Petitioners therefore took out another summons before

(1) Law Rep. 15 Eq. 284.

L. JJ.
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CRABTREE'S
SETTLED
ESTATES.

Vice-Chancellor *Bacon*, under the 2nd section of the *Leases and Sales of Settled Estates Amendment Act*, 1874 (1), that directions might be given that the notice prescribed by that section might be given to the two Respondents, by delivering such notice to and leaving it with the principals or managers of the asylums in which they were respectively inmates, or in such other manner as might be deemed proper.

The Vice-Chancellor thought that the case did not come within the meaning of the section referred to, but desired that the point might be mentioned to the Court of Appeal.

The application was therefore renewed before the Lords Justices.

Mr. *Kay*, Q.C., and Mr. *Phear*, for the Petitioners:—

In the case of *In re Venner's Settled Estates* (2), where the application was made under the original Act (19 & 20 Vict. c. 120), the Master of the Rolls considered that the consent of a person of unsound mind, not so found by inquisition, might be given by a guardian appointed for that purpose. But in *In re Clough's Estate* (3) that case was overruled, and it was held that the Court had no power to consent on behalf of a person of unsound mind, or to appoint a guardian for such a purpose. But the Act of last session (37 & 38 Vict. c. 33) has met the difficulty by enacting that notice may be given to all such persons who do not consent; and that if no consent is notified within the time limited, such

(1) 37 & 38 Vict. c. 33, s. 2: "Where under the principal Act the concurrence or consent of any person in or to any application hereafter to be made under that Act is required, and such concurrence or consent shall not have been obtained, notice shall be given to such person in such manner as the Court to which such application shall be made shall direct, requiring him to notify, within a time to be specified in such notice, whether he assents to or dissents from such application, or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the Court; and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice, and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court."

(2) Law Rep. 6 Eq. 249.

(3) Ibid. 15 Eq. 284.

persons shall be deemed to have submitted their interests to the Court.

[The LORD JUSTICE MELLISH:—A person of unsound mind cannot consent: if a consent from him were produced it would be void. If persons of unsound mind were intended to be included, would they not have been expressly mentioned?]

No consent is required. The person so served is to be deemed to have submitted his rights to the Court, which is strictly appropriate to the case of a person of unsound mind. The service may be in such manner as the Court thinks fit, which includes substituted service. Lunatics, so found, and infants and married women, are all provided for by the Act, and it is unlikely that the case of persons of unsound mind not so found was intended to be omitted.

SIR W. M. JAMES, L.J.:—

In the ordinary practice of the Court of Chancery, service on a Defendant is good although he is of unsound mind: and his guardian *ad litem* is appointed afterwards. I think we have power to direct service in this case. But notice must be served personally on the persons of unsound mind, and other copies of the notice must be left with the persons in whose charge they were.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Few & Co.*, agents for Mr. *H. J. Carr*, *Leeds.*

L. JJ.
1875
Feb. 17.

WILLIAMS *v.* GAMES.

[1871 W. 260.]

Partition—Sale—31 & 32 *Vict. c.* 40, *s.* 5—*Sale of Share by Valuation.*

Where in a partition suit, one of the part owners asks for sale and others ask for partition, the Court has not, under 31 & 32 Vict. c. 40, s. 5, power to order that the part owner who asks for a sale shall sell to the others his share at a valuation, and to order that a partition amongst the others shall then be made.

Decree of the Master of the Rolls varied.

THE Plaintiffs, who were the owners of one seventh of an estate, consisting of certain farms in *Radnorshire,* and of an undivided moiety in a warehouse at *Bristol,* filed the bill in this suit against the owners of the other six sevenths, praying for a partition of a sale.

At the hearing before the Master of the Rolls the Plaintiffs asked for a sale, as did the owners of one other seventh. The owners of the other five sevenths objected to a sale and asked for a partition, whereupon the Master of the Rolls made a decree, that certain of the Defendants undertaking to purchase the two sevenths, a valuation thereof should be made in Chambers; that the owners of the two shares should be paid the amount of the valuation and execute conveyances of their shares; and that thereupon an inquiry should be made as to the persons entitled, and a partition be made accordingly.

The Plaintiffs appealed from so much of the decree as directed a valuation and sale of their shares.

Mr. *J. Pearson,* Q.C., and Mr. *Freeling,* for the Plaintiffs:—

The Master of the Rolls conceived that he had, under 31 & 32 Vict. c. 40, s. 5 (1), power to compel us to sell our share, but no

(1) 31 & 32 Vict. c. 40, s. 5: "In a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the

such power is given. The only power is to direct a sale of the whole, unless some of the other owners choose to buy the share of those who wish a sale. There is no power to direct a compulsory sale of a share and then a partition.

We are of opinion that we shall get more if the property is sold than we shall on a valuation of our share. We wish for a sale, but we should prefer a partition to having our share taken in this way. It was never intended that the Court should have power to force some of the owners to sell to the others and then let them go on with the partition.

Mr. *Macnaghten*, and Mr. *Badcock*, for some of the Defendants.

Mr. *Horton Smith*, for the Defendants who undertook to purchase:—

We object to a sale, as some of the property has been in the family for 250 years. The Plaintiffs asked for a sale, and then the Court had power under the Act to direct a sale at a valuation of the shares of those who wished for a sale.

SIR W. M. JAMES, L.J.:—

It is clear that the Act was intended for the benefit of those part owners who want to have a sale, in which case the other parties interested who object to a sale may be compelled to buy the shares or have a sale. But there is nothing to compel a man to sell his share; the whole section is for the benefit of those who want a sale. If the result of a Plaintiff asking for a sale of the whole is that he must give up his share and have it valued, he may be compelled to move to vary the certificate, and then to appeal to this Court, and so be put to much expense on which he did not calculate. He may, on being put to such terms, withdraw his request for a sale, and have a partition.

Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions."

L. JJ. 1875 WILLIAMS v. GAMES.

SIR G. MELLISH, L.J.:—

In my opinion it is clear, upon the construction of this section, that it was intended for the benefit of part owners who desire a sale. [His Lordship read the section, and observed that nothing was to be done, except at the request of the person who desired a sale.] I cannot see any reason to think that it was intended to compel a part owner to sell his share against his will.

Usual partition decree. No costs of the appeal.

Solicitors: Messrs. *Vizard & Co.*, agents for Mr. *G. H. Page, Hay, Brecon;* Messrs. *Heath & Parker.*

L. JJ. 1875 *March* 3.

SHEFFIELD *v.* SHEFFIELD.

[1872 S. 215.]

Practice—Dismissal—Appeal—Discretion.

Where, on a motion to dismiss for want of prosecution, the Judge of the Court below has, by way of indulgence, given further time to the Plaintiff, the Court of Appeal will not interfere with the order so made in the discretion of the Judge of the Court below.

THE bill in this suit was filed on the 27th of July, 1872, and the answer was filed in December, 1873. The Defendants, in November, 1874, gave notice of motion to dismiss for want of prosecution, whereupon the solicitors of the Plaintiffs gave by letter an undertaking to file a replication or give notice of motion for decree within fourteen days from the 14th of November, 1874. The Plaintiffs did not file a replication or give notice, but applied for leave to amend. On the 7th of December the Defendants gave notice of motion to dismiss for want of prosecution. The motion and the application for leave to amend came before the Vice-Chancellor *Malins* on several days. Ultimately he refused leave to amend, and, on the 16th of January, 1875, made an order that the Plaintiffs should, on or before the 30th of January, 1875, file a replication, or in default thereof the bill should stand dismissed with costs, the Plaintiffs to pay the costs of the motion.

His Honour appeared to have considered that the Plaintiffs were placed in their position by the mistake of a clerk, and were entitled to indulgence.

The Defendants now moved, by way of appeal, that the order might be altered by ordering the bill to be dismissed.

Mr. *Higgins*, Q.C., and Mr. *Whitehorne* (Mr. *J. Pearson*, Q.C., with them), for the Appellants:—

We had, in November, 1874, an absolute right to have the bill dismissed, and the Vice-Chancellor ought not to have regarded the excuse: *Burkinshaw* v. *Wilson* (1); *Vernon* v. *Vernon* (2). We accepted instead the undertaking of the Plaintiffs; and it ought to be considered as an order of the Court. The only thing alleged by the Plaintiffs is, that they intended to amend, but the Vice-Chancellor refused them leave to do so.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the Plaintiffs, were not called upon.

SIR W. M. JAMES, L.J.:—

It appears to me that in such cases as this, the Master of the Rolls and the Vice-Chancellors may well be trusted to consider and to make due allowance for the conduct of the parties before them.

The sole question is, whether the Plaintiffs shall be allowed to file a replication in this suit, or shall be driven to file another bill. The Vice-Chancellor appears to have treated it as a matter of indulgence, and in such cases the Court below must be taken to have considered all the circumstances of the case, and to have seen whether the proceedings have been *bonâ fide*, and whether there has been anything like misconduct or sharp practice, and to have dealt with the case accordingly. It cannot be to the advantage of the parties that upon every case, after due explanations have been given and the matter has been discussed in the Court below, there shall be an appeal to another Court upon the chance that that Court may take a different view of the case.

(1) Law Rep. 12 Eq. 103. (2) Law Rep. 6 Ch. 833.

L. JJ. 1875 SHEFFIELD v. SHEFFIELD.

The Vice-Chancellor has given this indulgence, and in this case it is impossible that any harm can thereby be done. I will not encourage appeals in cases which, like this, depend entirely upon the discretion of the Judge. This appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitor for the Plaintiffs: Mr. *F. Sheffield.*
Solicitors for the Defendants: Messrs. *Dawes & Sons.*

L. JJ. 1875 Jan. 15.

Ex parte SYDNEY. *In re* SYDNEY.

Bankruptcy—Resolution for Second Composition when proceedings are pending in a former Composition—Bankruptcy Act, 1869, *s.* 126—*Registration of Resolution.*

When a resolution for composition has been passed which is capable of being enforced against a debtor, he cannot present a second petition for liquidation or composition; and any resolution passed under such a petition is void, and ought not to be registered.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

On the 19th of July, 1873, Messrs. *Edgar Sydney* and *E. J. Wiggins*, who carried on business in *London* as ship and insurance brokers, filed a petition for liquidation or composition.

The first meeting of creditors was held on the 6th of August, 1873, at which the debtors made a statement of their liabilities and assets, from which it appeared that their liabilities amounted to £39,023 17*s.* 7*d.*, and assets to £779 13*s.* A resolution was passed by the requisite majority of creditors, at an adjourned meeting on the 13th of August, agreeing to a composition of 2*s.* 6*d.* in the pound, payable by instalments as follows, namely, 6*d.* within three months, 1*s.* within six months, and 1*s.* within twelve months after the registration of the resolution, the last instalment to be guaranteed by the joint and several promissory notes of the

debtors and Mr. *T. Norfolk.* This resolution was duly registered on the 9th of September.

The debtors were unable to obtain the promissory note from Mr. *Norfolk*, and accordingly some of the creditors refused to accept the composition; and one of them commenced proceedings in the Court of Common Pleas, and another by debtor's summons against the debtors, and they obtained payment of their whole debts.

When the second instalment became due, the debtors sent notice to their creditors that they were prepared to pay it; but several refused to accept it. The debtors were unable to meet the last instalment, and having in the meantime contracted fresh debts, they filed a fresh petition for liquidation on the 26th of August, 1874. It appeared from the statement then produced by the debtors that their liabilities amounted to £42,682 14*s.* 8*d.*, and their assets to £81 8*s.* 7*d.* At the first meeting of creditors a resolution was passed by the requisite majority to accept a composition of 6*d.* in the pound. The Registrar, Mr. *Keene*, refused to register this resolution, on the ground that the composition accepted by the creditors under the resolution on the former petition had not been paid, and Mr. Registrar *Hazlitt*, sitting as Chief Judge, affirmed his decision. The debtors now appealed to the Court of Appeal.

Mr. *Davey*, and Mr. *Crump*, for the Appellants:—

The Registrar exceeded his duty in refusing to register the resolution. He has only to see that the resolution is passed by the requisite majority, and that the due formalities have been complied with. He has no discretion to consider whether the composition is reasonable or not: *Ex parte Levy* (1). The policy of the statute is that the creditors should protect their own interests; and in the present case all the creditors, with the exception of the Respondents, were unanimous in wishing the debtor's affairs to be settled by a composition, and not by a bankruptcy. It is true that by the last paragraph of the 126th section of the *Bankruptcy Act*, 1869, the debtors might be made bankrupts under the former petition; but that clause is only optional, and in the present case no good purpose would result from acting under it.

(1) Law Rep. 11 Eq. 619.

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SYDNEY.
In re
SYDNEY.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for some of the opposing creditors, and Mr. *J. Linklater*, for others, were not called on.

SIR W. M. JAMES, L.J. :—

I am of opinion that the decision of the Registrar was right. The real question is a short one, whether two compositions can go on at the same time; in other words, whether, when a debtor has got his creditors to consent to a composition which is still existing and capable of being enforced, he can get a resolution passed for another composition, so as to interfere with the rights of the creditors under the first. The Registrar thought he had no such power, and I think the Registrar was right.

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The same principle applies equally to cases of bankruptcy, liquidation, and composition. Any interference with pending proceedings in either case can only take place with the assistance of the Court. Whether a debtor has become bankrupt, or a liquidating or compounding debtor, he is not in a position to call a meeting in the same way as if he was a person calling together his creditors for the first time. When he has once placed himself in the position of a bankrupt, or a liquidating or compounding debtor, until the proceedings in bankruptcy, liquidation, or composition so begun are at an end, he is not a free man, capable of entering into any arrangement whereby the rights of persons under the existing bankruptcy, liquidation, or composition may be interfered with. The Registrar was therefore right in deciding that the debtors in this case were not debtors capable of making a composition with their creditors, and he was right in refusing to register the resolution. The resolution was inoperative as regards the old creditors, and consequently inoperative as regards the others. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors: Mr. *W. A. Crump*; Messrs. *Parker & Clarke*; Mr. *Bailey*.

Ex parte JACOBS. *In re* JACOBS.

L. JJ.
1875
Jan. 15, 29

Principal and Surety—Discharge of Surety—Bill of Exchange—Resolution to accept Composition from Acceptor—Discharge of Drawer—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126.

Where the acceptor of a bill of exchange presents a petition for liquidation or composition under the *Bankruptcy Act*, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is not thereby discharged from his liability. In such a case it makes no difference whether the bill-holder is present at the meeting or not, or whether he votes in favour of the resolution or against it.

Megrath v. *Gray* (1) followed.

Wilson v. *Lloyd* (2) disapproved.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy, by which he adjudicated *Sidney Jacobs* a bankrupt.

On the 13th of April, 1874, *Jacobs* drew a bill of exchange upon *Samuel Phillips* for £100, payable at two months. This bill was indorsed by *Jacobs* to *James Martin* for value.

On the 1st of June, 1874, *Phillips* filed a petition for liquidation. At the first meeting of creditors, which was held by adjournment on the 14th of July, a resolution was passed by the requisite majority of creditors agreeing to accept a composition of 5*s.* in the pound. Mr. *Butcher*, *Martin's* solicitor, attended this meeting on his behalf, and opposed the resolution, but at the second meeting, held on the 24th of July, Mr. *Butcher*, on his behalf, signed the resolution confirming the resolution passed at the first meeting. Mr. *Butcher* stated in his affidavit that he signed the resolution because he saw that it would have been carried by a majority of the creditors without his consent; and also because *Jacobs*, the drawer of the bill, had himself filed a petition for liquidation, which was expected to be agreed to by his creditors. Mr. *Butcher* also stated that *Jacobs* was aware at the time that he was attending the meeting of the creditors of *Phillips* on behalf of *Martin*, and that he intended to obtain such composition.

Jacobs filed a petition for liquidation on the 19th of June, and

(1) Law Rep. 9 C. P. 216. (2) Law Rep. 16 Eq. 60.

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the first meeting of his creditors was held on the 9th of July, and was adjourned from time to time, but no resolution for liquidation or composition having been agreed to by his creditors, *Martin* filed a petition for adjudication against him on the 25th of August, 1874, the debt alleged being the sum of £100 due from him as the drawer of the bill of exchange, and the act of bankruptcy being the presenting of the petition for liquidation.

On this petition *Jacobs* was adjudicated bankrupt, and he appealed from the order of adjudication.

Mr. *De Gex*, Q.C., Mr. *Winslow*, Q.C., and Mr. *E. C. Willis*, for the Appellant:—

The case comes within the rule that a creditor cannot discharge his principal debtor without at the same time discharging the surety. He cannot make a bargain with his debtor which affects the liability of the surety. It might have been different if the bill-holder had voted against the composition. Or else a stipulation ought to have been introduced in the resolution expressly reserving the remedies against the drawer. *Wilson* v. *Lloyd* (1), and *Cragoe* v. *Jones* (2) are authorities in our favour.

Mr. *Roxburgh*, Q.C., and Mr. *Lamaison*, for the petitioning creditor:—

This was not a voluntary proceeding on the part of the creditor. The resolution for composition derives all its power of discharging the creditor from the statute. It would have made no difference if the bill-holder in this case had voted against the composition. There was a majority of creditors without his vote. The proceedings under the 125th and 126th sections are all proceedings in bankruptcy, and the discharge under them operates in the same manner as a discharge under an adjudication. In such a case there is no question that the drawer of the bill would not have been discharged. *Megrath* v. *Gray* (3) and *Green* v. *Wynn* (4) are directly in point.

Mr. *De Gex*, in reply.

Jan. 29. SIR W. M. JAMES, L.J.:—

I have only to express my entire concurrence in the judgment

(1) Law Rep. 16 Eq. 60.
(2) Ibid. 8 Ex. 81.
(3) Law Rep. 9 C. P. 216.
(4) Ibid. 4 Ch. 204.

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I am about to read, which the Lord Justice (who is unavoidably absent) has been good enough to prepare.

This was an appeal from an order of Mr. Registrar *Spring Rice*, by which he adjudicated the Appellant, Mr. *Sidney Jacobs*, a bankrupt. The ground of the appeal was, that there was no valid petitioning creditor's debt. The alleged petitioning creditor's debt consisted of a claim by one *Martin* in respect of a bill of exchange drawn by *Jacobs* upon one *Samuel Phillips*, and of which *Martin* was the holder. After the bill of exchange had been dishonoured, and whilst both *Phillips* and *Jacobs* were liable to *Martin* on the bill of exchange, *Phillips* called a meeting of his creditors under the 125th and 126th sections of the *Bankruptcy Act*, 1869. At that meeting *Martin*, by his solicitor, attended; the proper majority of the creditors voted in favour of receiving a composition from *Phillips;* but *Martin*, by his solicitor, voted against accepting the composition. A second meeting of *Phillips*' creditors was duly held, when the resolutions in favour of the composition were confirmed, and *Martin*, on the occasion, voted in favour of the composition. The question to be determined is, whether *Martin*, by voting in favour of accepting a composition from *Phillips*, the acceptor, had discharged *Jacobs*, the drawer, and can no longer maintain an action against him on the bill. There can be no doubt that, if the holder of a bill, by becoming party to a deed or agreement, independently of any bankruptcy Act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but, on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected. We have now to consider whether the discharge of the acceptor under the 125th and 126th sections of the *Bankruptcy Act*, 1869, when the holder of the bill votes in favour of the liquidation or composition, is to be considered as a discharge by the voluntary act of the holder, or a discharge by operation of law. In the case of *Wilson* v. *Lloyd* (1) the Chief Judge held that a surety was discharged by the creditor voting in favour of accepting a composition from the principal debtor. There were, however, a great many points in that case; and we think that the difference between a composition by a voluntary deed or agree-

(1) Law Rep. 16 Eq. 60.

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ment and by composition under the *Bankruptcy Act*, was not sufficiently considered. On the other hand, in the case of *Megrath* v. *Gray* (1) the Court of Common Pleas appear to have come, after great consideration, to a directly contrary conclusion. In that case, among the liabilities of the firm of *Megrath & Highton* were two acceptances; the partnership between the two was dissolved, *Highton* undertaking to pay all debts and indemnify *Megrath*. *Highton* filed his petition under the *Bankruptcy Act*, and the *Adelphi Bank*, the holders of the bills, voted in favour of the resolution, and it was held that they had not, by so doing, discharged *Megrath*.

We entirely agree in the decision of the Court of Common Pleas, and in the reasons they have given for it. We think that a discharge of a debtor under a liquidation or a composition is really a discharge in bankruptcy by operation of law. Where a creditor voluntarily agrees to a composition by deed or agreement with the acceptor, it is by his act alone that the acceptor is discharged and the position of the drawer altered. When, however, a debtor summons his creditors under the 125th and 126th sections of the *Bankruptcy Act*, 1869, the proper majority of the creditors have power to assent to the terms by which the debtor is to be discharged, whether the creditor who is the holder of the bill chooses to attend or not or chooses to vote or not. The consequence of holding that the holder of a bill could not vote at a meeting of the acceptor's creditors without discharging the drawer would be that in many cases a great number, and in some cases the majority, of the creditors could not vote at the meeting. On the other hand, if resolutions for liquidation by arrangement or for composition were to contain a reserve of remedies by the creditors against any other person than the debtor, the consequence would be that the debtor would not, either by arrangement or by composition, be completely discharged from any of his debts in respect of which the creditor had a remedy against any other person, which we think would be contrary to the intention of the Act. On the whole, we are of opinion that the order of the Registrar must be affirmed, and the appeal dismissed with costs.

Solicitors: Messrs. *Hand, Son, & Johnson*; Mr. *C. Butcher*.

(1) Law Rep. 9 C. P. 216.

Ex parte WALTON. *In re* DANDO.

L. JJ.
1875
Feb. 13.

Bankruptcy—Adjudication—Concurrent Proceedings in Liquidation—Staying Proceedings in Bankruptcy under Rule 266 *of the Bankruptcy Rules*, 1870 *—Discretion of Court—Bankruptcy Act*, 1869, *s.* 80, *sub-s.* 10.

Where a debtor against whom a petition for adjudication of bankruptcy has been presented files a petition for liquidation, the Court has a discretion either to postpone the adjudication till after the meeting of creditors, under the *Bankruptcy Act*, 1869, s. 80, sub-s. 10, or to adjudicate the debtor a bankrupt and suspend the proceedings under the adjudication under Rule 266 of the *Bankruptcy Rules*, 1870, or to adjudicate him a bankrupt simply :—

Semble, Rule 266 is only intended to apply to cases where the Judge considers that the property would not be sufficiently protected by the proceedings in liquidation.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

On the 4th of January, 1875, a petition for adjudication was presented against *W. E. Dando* by *J. Fitzpatrick* in the *London* Court of Bankruptcy.

On the 27th of January *Dando* filed a petition for liquidation in the same Court. It appeared from his statement of assets that they would be only sufficient to pay a very trifling dividend.

On the 28th of January *Dando* was adjudicated bankrupt.

On the 4th of February the bankrupt and *S. Walton*, one of his creditors who was desirous of proceeding under the liquidation, applied to the Registrar to stay the publication of the advertisements till after the meeting of creditors under the liquidation, which had been summoned for the 18th of February. The Registrar refused the application, and the bankrupt and *Walton* appealed from this decision.

Mr. *Caldecott*, for the Appellants :—

Rule 266 of the *Bankruptcy Rules*, 1870 (1), is compulsory, and

(1) Rule 266 is as follows :—"Where proceedings have been instituted for liquidation or composition the Court may adjudicate the debtor bankrupt if in the opinion of the Court the property of the debtor cannot be sufficiently protected by the exercise of the power hereinbefore given to restrain suits and actions, and the appointment of a receiver or manager; but in any such

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the Registrar ought to have stayed the proceedings under the adjudication till the result of the meeting of creditors is known. The intention of the Legislature was that the creditors should decide whether the proceedings should be in bankruptcy or in liquidation; and the discretion which he would otherwise have had under the 80th section, sub-sect. 10, of the Act (1), either to adjudicate simply or to postpone the adjudication, is restrained by the 266th rule. It is true that in *Ex parte Foster* (2) there were some observations in the judgment which seemed to have a contrary effect, but they were not necessary for the decision in that case.

Mr. *J. S. Colquhoun,* for the trustee, was not called on.

SIR G. MELLISH, L.J.:—

This is an appeal from a decision of Mr. Registrar *Pepys,* by which, having adjudicated *W. E. Dando* a bankrupt, he refused to stay the proceedings in the bankruptcy until the meeting of his creditors had been held under a liquidation petition presented by the bankrupt the day before the adjudication. It is argued by the Appellants that the Registrar had no discretion, but was bound by the 266th rule to stay all proceedings until the meeting had been held at which it would be determined whether *Dando's* creditors would or not agree to a liquidation or composition. In *Ex parte Foster* we had to consider fully the effect of sect. 80, sub-sect. 10, and Rule 266, and I expressed an opinion that where proceedings in bankruptcy and liquidation were pending at the same time, the Registrar had three courses open to him: he might,

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case all proceedings under such order of adjudication shall be stayed immediately upon the making thereof, and until the creditors shall have passed some special or extraordinary resolution in reference to the liquidation or composition, and in the event of any such resolution being duly passed the adjudication shall be forthwith annulled."

(1) 32 & 33 Vict. c. 71, s. 80, sub-s. 10: "The Court may at any time, on proof to its satisfaction that proceedings in bankruptcy ought to be stayed by reason that negotiations are pending for the liquidation of the affairs of the bankrupt by arrangement, or for the acceptance of a composition by the creditors in pursuance of the provisions hereinafter contained, or on proof to its satisfaction of any other sufficient reason for staying the same, make an order staying the same either altogether or for a limited time on such terms and subject to such conditions as the Court may think just."

(2) Law Rep. 10 Ch. 59.

under sect. 80, sub-sect. 10, postpone the proceedings in bankruptcy altogether till after the meeting of creditors; or he might, under the 266th rule, adjudicate the debtor a bankrupt, and stay proceedings under the adjudication; or he might simply make an adjudication. It was not strictly necessary in that case to lay down that the Registrar had this third alternative, and therefore it was quite open to Mr. *Caldecott* to contend that he had no such discretion. But I am still of the same opinion, and I think that the Registrar in the present case was not precluded from simply adjudicating the debtor a bankrupt, without more.

If we look at the words of the Act alone, it appears plain that sect. 80, sub-sect. 10, gives a discretion to the Registrar; and if the case had rested on that alone, there could be no doubt that the Registrar had power to act as he did act. Then, with respect to the 266th rule, I think it could not have been intended to take away from the Registrar any power given him by the Act. It would be most inconvenient if it did so; for it may often happen, as in the present case, that a considerable time elapses after the petition for adjudication is presented before the petition for liquidation is presented. If a debtor could postpone presenting his petition for liquidation till the morning when the adjudication was to be made, and then say, "You cannot go on till a meeting of my creditors has taken place," the result might be most inconvenient. I cannot, therefore, think that it was intended to take away from the Registrar the discretion given him by the 80th section. The 266th rule merely says, that "in such case"—that is, if the property of the debtor cannot be sufficiently protected by the power thereinbefore given—but in such case only, all proceedings under the adjudication shall be stayed. I do not think the rule applies to a case where the Court is satisfied that there is sufficient protection to the property.

The other question in this appeal is, whether the Registrar had good grounds for refusing to suspend the proceedings. We ought not to interfere with the exercise of his discretion unless we see clearly that he was wrong upon the facts.

The fact of the petition for liquidation not having been presented till the day before the adjudication, is a strong reason for supposing that it was filed merely for the purpose of delay. Where

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delay takes place on the part of the debtor, it furnishes in itself a strong ground for the course taken by the Registrar. If the debtor could have shewn that he had a clear majority of the creditors in his favour, it might have been different; but the consequence of filing his petition so late was that there was no opportunity of ascertaining the real sentiments of the body of the creditors. Another reason for refusing to postpone the adjudication is, that there were really hardly any assets. On the whole, I cannot say that I think that there was a wrong exercise of discretion by the Registrar—that is all we have now to consider. I think that the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion on both points. Whatever doubts I may have entertained at first as to the meaning of the Rule, I am now satisfied that the construction is what the Lord Justice has put upon it.

Solicitors: Mr. *S. Mayhew*; Messrs. *Watkins & Clift.*

L. JJ. 1875 *Feb.* 13.

Ex parte HARE. *In re* ENGLAND.

Bankruptcy—Proof of Debt—Vote for Trustee—Person appointed by the Court of Chancery—Bankruptcy Rules, 1870, *rr.* 67, 68.

Post 270 & D. 24.

A creditor of a bankrupt died before the commencement of the bankruptcy, and his estate was administered in Chancery in a suit instituted by a creditor against the administratrix. The Court of Chancery appointed a person who was not the administratrix to prove the debt against the bankrupt's estate:—

Held, that the person appointed by the Court had a right to prove the debt, and also to vote for the appointment of a trustee at the meeting of creditors.

The 67th and 68th Rules of the *Bankruptcy Rules*, 1870, only apply to ordinary cases, and not to proofs by persons appointed by the Court of Chancery or of Lunacy to represent the creditor's estate.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

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The bankrupt, *Philip Newberry England*, in November, 1870, filed a petition for liquidation in the *London* Bankruptcy Court, and his creditors resolved to accept a composition of 8*s.* in the pound, and that resolution was duly confirmed and registered.

One of the creditors at the time was *J. E. Guerra*, a wine merchant in *London*, who claimed to prove for £5075, due to him from *England* on certain bills of exchange and promissory notes. Some objections were raised to this proof, but it was ultimately allowed. This composition was never paid.

Guerra died on the 8th of July, 1874, intestate, and letters of administration of his estate were granted to his widow, *Cecilia Guerra*, who was a daughter of *England*. A suit was instituted in Chancery for the administration of *Guerra's* estate by the *Royal Oporto Wine Company*, who were creditors to a large amount. On the 2nd of December, 1874, an order was made by Vice-Chancellor *Hall* in that suit on the application of the Plaintiffs, by which the Plaintiffs, or *H. C. Hare*, who was a clerk of their solicitors, on their behalf, should be at liberty to prove the debt due to the estate of the intestate by *P. N. England*, and to tender proof in the matter of the said *P. N. England's* then present or any future proceedings for liquidation by arrangement or composition with his creditors, or under any adjudication in bankruptcy against the said *P. N. England*, and that the said *H. C. Hare* should be at liberty to vote at the creditors' meetings in the present or any future proceedings for liquidation by arrangement or composition with his creditors, or under any adjudication of bankruptcy.

On the 8th of December, 1874, *England* was adjudicated a bankrupt, and on the 29th of January, 1875, the first meeting of creditors was held. On that occasion *Hare* tendered a proof for £6026 for the original debt and interest, and claimed to vote on the appointment of a trustee. He filed an affidavit stating his appointment by the Court of Chancery, and stating that to the best of his belief the debt was still due to the estate of the intestate. One of the other creditors, and also the bankrupt, objected to the proof, on the ground that the greatest part of the debt had been paid off, and also that *Hare* was not the proper person to represent the creditor's estate. The Registrar was of opinion that *Hare* was not the proper person legally entitled to prove or to

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vote on the appointment of a trustee or otherwise, and that the proof was of such a nature as to demand investigation by the trustee when appointed; and he accordingly refused to allow *Hare* to vote, and ordered that the proof should be adjourned until after the appointment of the trustee.

From this decision *Hare* appealed.

Two trustees and a committee of inspection were appointed by the other creditors present, but the certificate of appointment was suspended to permit of the prosecution of the appeal.

Mr. *De Gex*, Q.C., and Mr. *F. Turner*, for the Appellant:—

If the Registrar doubted the validity of the claim, or thought that it required more investigation before he admitted it, he ought to have admitted it as a claim, and allowed *Hare* to vote for the trustee, and adjourned the proof to a subsequent time: *Ex parte Simpson* (1). The objection made by the Registrar to the right of *Hare* to represent the estate of the creditor is unfounded. The 67th and 68th Rules of the *Bankruptcy Rules*, 1870, and the form of affidavit to which they refer, only apply to the ordinary case where the creditor is alive and able to swear to the debt. Where an estate is being administered in Chancery, the Court constantly takes the matter out of the hands of the legal personal representative, and not only appoints a person to prove, but settles the amount of the debt for which he is to prove. And it makes no difference whether such person is the receiver of the estate or some other person specially appointed for the purpose. Instances of this being done are *Dornford* v. *Dornford* (2); *Bick* v. *Motley* (3); *Ex parte Oxtoby* (4); and, under the present Act, *Armstrong* v. *Armstrong* (5); *Ex parte Westcott* (6).

Mr. *Roxburgh*, Q.C., and Mr. *J. E. Palmer*, for the trustee:—

The 31st section of the *Bankruptcy Act*, 1869, says that the debts are to be proved in the prescribed manner, and there is no manner prescribed except that pointed out by the 67th and 68th Rules, and under them the creditor or his agent must pledge his

(1) 1 Atk. 68.
(2) 12 Ves. 127.
(3) 2 My. & K. 312.
(4) De G. 453.
(5) Law Rep. 12 Eq. 614.
(6) Ibid. 9 Ch. 626.

oath to the existence of the debt. In the present case, the creditor being dead, his legal personal representative is the creditor, and she or her agent is the only person authorized to prove the debt. The person appointed by the Court of Chancery is not the agent of the administratrix, and knows nothing whatever about the debt.

[SIR W. M. JAMES, L.J.:—There are no negative words in the 67th and 68th Rules. There are a multitude of cases to which those rules cannot apply. Whenever the Court of Chancery takes the administration of the creditor's estate out of his hands, it appoints a person to prove. In the same way the committee of a lunatic and a guardian *ad litem* of a person of unsound mind have power to prove.]

In the two cases cited under the present Act the receiver of the estate appointed by the Court was directed to prove the debt, which at all events would be more consistent with the practice of the Court in analogous cases; but in neither of those instances was the point argued, and we contend that such appointment was not justified by the Act. The present was a case which justified the Registrar in dealing strictly with the proof, for the bankrupt asserts that the greatest part of the debt has been paid off; and if the debt, as claimed, were admitted, it is so large that it would give *Hare* the complete command of the meeting.

Mr. *E. C. Willis*, for the bankrupt, followed the same line of argument.

SIR W. M. JAMES, L.J.:—

With regard to the ground on which the Registrar proceeded when he refused to admit the proof, it is necessary for us to express our opinion. The Registrar thought that the person appointed by the Court of Chancery was not the right person to prove for the debt or to vote on the appointment of a trustee, and that nobody but the administratrix was entitled to prove. It appears to me that the Registrar did not give sufficient weight to the established practice of the Court of Chancery. In this case, the

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administratrix, who was the legal creditor, has been deprived of her powers. The estate is the real creditor, and the Court of Chancery, which, for some reason, has undertaken the administration of the estate, has thought fit to appoint a person who is, in effect, the receiver of the Court in respect of this particular thing. He is in the same position as if he had been appointed a receiver of an estate, or the guardian *ad litem* of a person of unsound mind, or the committee of a lunatic. I am therefore of opinion that the Registrar was not right in treating this as an insuperable objection to the *status* of the person who sought to prove. The Registrar did not think it necessary to make the appointment of a trustee stand over for investigation of the debt, though he probably would have done so if he had felt no difficulty as to the person proving. I think it will be better that it should stand over, and the matter must therefore go back to the Registrar to inquire as to the amount of the debt, and the proceedings will be suspended till the inquiry has been made. In this particular case there is so much *primâ facie* doubt that the simple ordinary affidavit is not sufficient.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *W. F. Stokes;* Mr. *Parke;* Mr. *J. B. Pittman.*

L. JJ. 1875 *Feb.* 25.

Ex parte WARREN. *In re* JOYCE.

Liquidation by Arrangement—Receiver—Taking Possession of Debtor's Business —Undertaking as to Damages—Bankruptcy Rules, 1870, *r.* 260.

A petition for liquidation having been presented, a receiver was appointed and ordered to take possession of the fixtures and stock-in-trade at the debtor's brewery; and an injunction was granted restraining a mortgagee, who was in possession of the brewery under a bill of sale, from intermeddling with the chattels in the brewery. When the injunction was granted the receiver and the debtor gave undertakings to be answerable for damages. The mortgagee afterwards established his title to the brewery and the chattels in it, and then applied for an inquiry as to damages sustained by the occupation of the receiver:—

Held, that the receiver must be treated as the agent of the creditors, and

not of the mortgagee, and could not charge the mortgagee with the expense of carrying on the business; and that he was liable, under his undertaking, for damage for deterioration of the property, and for rent for use and occupation of the fixtures and stock-in-trade; and an inquiry was directed accordingly.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

By an indenture dated the 28th of August, 1872, *James Smith Joyce* mortgaged a leasehold brewery at *Brixton*, called *The Brixton Brewery*, and all the fixtures, fittings, machinery, utensils, carts, horses, articles, and effects which were or should be at any time during the continuance of the security in the brewery, or used in the business, to *Joseph Loxdale Warren* for £1000. The mortgage contained a power of sale in the usual form. This indenture was not registered under the *Bills of Sale Act*.

On the 19th of February, 1874, *Warren* took possession of the brewery and the other property comprised in the security.

On the 20th of February the debtor filed his petition for liquidation, and on the same day *T. M. Purday* was appointed receiver and manager of the debtor's property and business. On the 21st an order was made, under Rule 260 of the *Bankruptcy Rules*, 1870, on the application of the receiver, restraining *Warren* from seizing, removing, or intermeddling with any of the debtor's assets then in or on the debtor's premises at *Brixton*. On the occasion of this order being made, the receiver, and also the debtor, gave an undertaking to abide by any order the Court might think fit to make as to damages in case the Court should be of opinion that the said *J. L. Warren* should have sustained any damages which the receiver or the debtor ought to pay.

A motion was afterwards served on *Warren* to continue the injunction, which motion was adjourned for various reasons from time to time, the last adjournment being made on the 23rd of May, and on each adjournment the receiver and the debtor renewed their undertaking to abide by any order as to damages.

The receiver, on his appointment, entered into possession of the brewery plant and other chattels used in the business, and carried on the business there until the 25th of April, when he discontinued the business and closed the house, finding, as he alleged, that the

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business was being carried on at a loss. This was done without any communication with *Warren*.

On the 21st of May, 1874, resolutions were passed for a liquidation by arrangement, and the receiver, *T. M. Purday*, was appointed trustee.

On the 4th of July an order was made by the Court, declaring that the goods, chattels, and fixtures in the brewery were the property of *Warren*, and not of the trustee, and ordering that possession of the brewery and the goods, chattels, and fixtures which at the time of the filing of the petition were on the premises should be delivered to *Warren*, and that *Warren* should have his costs of the application. This order was affirmed by the Court of Appeal on the 24th of July, and possession was delivered to *Warren* on the 8th of August. The taxed costs due to *Warren* amounted to £64 0*s*. 5*d*.

In the month of February, before the brewery was closed, a Mr. *Allen* offered to purchase the lease, with the fixtures and stock-in-trade, for £1000, and this offer was continued so long as the brewery was kept open; but by reason of the receiver being in possession, *Warren* was unable to conclude the sale. After the brewery had been closed, Mr. *Allen* refused to give more than £500, in consequence of the deterioration of the plant and stock-in-trade.

Warren complained that, besides the deterioration of the plant and stock-in-trade, several of the chattels had been lost or made away with during the possession of the receiver; and also that only 380 casks out of 1200 which were assigned to him by the mortgagee had been delivered up to him. It appeared, however, that a large number of the casks were, on the 19th of February, when *Warren* took possession, in the hands of customers, and they were claimed by the trustee as not having been in *Warren's* actual possession at the date of the liquidation.

In December, 1874, *Warren* applied to the Court for an order that the receiver and trustee and the debtor might pay to him, in accordance with their undertakings, the damages sustained by him by reason of the order for an injunction, and for an inquiry as to the amount of such damages. In opposition to this application, *Purday*, as receiver and trustee, carried in an account for

articles purchased and other expenses in carrying on the business while he was in possession, shewing a balance against *Warren* of £197. The Registrar disallowed many of the items in this account, but declared that *Warren* was liable to the amount of £75 4*s.*, and he accordingly made no order on *Warren's* application, except to declare that, after giving credit to *Warren* for £64 0*s.* 5*d.*, the amount of his taxed costs, there still remained due from him to the receiver and trustee the sum of £11 3*s.* 7*d.* From this order *Warren* appealed.

When the appeal first came on it was ordered to stand over at the suggestion of the Court, in order to serve the debtor with a notice of the appeal, which was accordingly done.

Mr. *De Gex*, Q.C., and Mr. *T. L. Wilkinson*, for the Appellant:—

The Registrar has treated the receiver as if he was the officer of the Court and the agent of both the creditors and the mortgagee; whereas he is only the agent of the creditors, and is acting hostilely to the mortgagee. On obtaining an injunction and turning the mortgagee out of possession, he must give an unqualified undertaking as to damages: *Ex parte Anderson* (1); and the mortgagee is entitled to be recompensed not only for the deterioration of the chattels, but the loss of profits while out of occupation: *De Mattos* v. *Gibson* (2). Several of the chattels included in the bill of sale are missing, among others a large number of casks, and all of them are deteriorated by the stoppage of the business. We are also entitled to be indemnified against the ground rent and taxes of the house while the receiver was in possession; and also for the loss of the opportunity of selling the brewery and business for £1000.

SIR G. MELLISH, L.J.:—That is not such damage as a jury would be allowed to take into consideration in a trial at law. Besides, you might have applied to the Court for permission to sell to the proposed purchaser notwithstanding the injunction.

Mr. *Roxburgh*, Q.C., for the trustee:—

All that the receiver did was done under the authority of the

(1) Law Rep. 5 Ch. 473. (2) 1 J. & H. 79.

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Court. He is, therefore, the agent of all parties, and the undertaking for damages must be taken to extend only to damage to the property arising from any act of his. With respect to the particulars of damage claimed by the Appellant, some of them are quite indefensible. No rent or taxes are chargeable to the receiver, for he was only in possession of the fixtures and chattels. The injunction did not extend to the house, which still remained in the mortgagee's possession. Then, the difference in the number of the casks arises from the fact that a large number of them were in the hands of customers at the time of the filing of the petition, and the mortgagee never had possession of them, but they passed to the trustee in the liquidation.

Mr. *Cabell*, for the debtor, asked to be discharged from his liability under the undertaking, and to have the costs of his appearance, which had been required by the Court. One of the renewed undertakings had been given by the debtor on the 23rd of May, 1874, after the appointment of the trustee, so that his liability under it would not be covered by his discharge in the liquidation.

SIR G. MELLISH, L.J.:—All liability under any of the undertakings given before the appointment of the trustee would be proveable in the liquidation. After his appointment, no undertaking ought to have been taken from the debtor.

SIR W. M. JAMES, L.J.:—

I think it must be referred back to the Registrar to ascertain the damage which has been sustained by the mortgagee by reason of the occupation of the receiver. The Registrar was not justified in taking the account of the receiver in the manner in which he did take it, treating him as the receiver on behalf of the mortgagee as well as of the mortgagor. He was in no sense the agent of the mortgagee, but he took possession of the mortgagee's property adversely to him, and carried on the business with it. With respect to the substance of the case, the mortgagee has a right to damages with respect to the chattels which he took under his mortgage security; but that only applies to those which he could take actual possession of; a very large item, namely, a large

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number of casks which did not pass to him because they were outstanding in the possession of the customers, will have to be excluded. Therefore the inquiry will be as to the damage sustained by deterioration by reason of the interference of the receiver with the chattels of which the mortgagee had taken possession; and a fair rent must be fixed for the receiver's use and occupation of the chattels which were taken from the mortgagee without his consent, but there will be no rent for the house, nor any allowance for the ground rent or taxes, as the mortgagee was not restrained by the injunction from the use of the house.

With respect to the debtor, there will be no order against him; but no costs will be allowed him.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *Boydell;* Messrs. *Harper, Broad, & Battcock.*

L. J. J.
1875
Jan. 29.

Ex parte CHATTERIS. *In re* STUDER.

Company—Address for Service—Substituted Service.

The liquidators of a company which was being wound up issued a debtor summons against a shareholder for unpaid calls, and obtained an order for substituted service at his registered address in the books of the company. The affidavit on which this order was obtained shewed no grounds for choosing that place except that it was his registered address, and that the articles contained a provision that notices required to be served by the company on shareholders might be served by leaving them at their registered addresses. It clearly appeared that for some years this had not been the shareholder's place of residence or business, and he had a few weeks previously, on an application in the winding-up, made an affidavit in which he gave a different address. Service having been made pursuant to the order, and the debtor having failed to comply with it, the liquidators applied for an adjudication in bankruptcy:—

Held, that the rule in the articles as to service of notices at the registered address did not give validity to the service of legal proceedings there, and that the question as to the validity of the order for substituted service and of the service under it was open on a petition for adjudication in bankruptcy, and that adjudication had rightly been refused.

THIS was an appeal by the liquidators of the *Imperial Land Company of Marseilles, Limited,* from a decision of Mr. Registrar

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Ex parte CHATTERIS. *In re* STUDER.

Murray, sitting for the Chief Judge, dismissing a petition for adjudication.

The act of bankruptcy relied on was non-payment in obedience to a debtor summons issued by the liquidators for calls.

An order for substituted service of the summons at No. 9, *Bruton Street,* had been obtained in August, 1874, from the *London* Bankruptcy Court, on an affidavit that the deponent had attended at 9, *Bruton Street,* for the purpose of serving it, and was informed on one occasion that *Studer* was staying in *Switzerland,* and on another that he was not there; that 9, *Bruton Street,* was the registered address of *Studer* in the books of the company; and that by the articles of the company "notices required to be served by the company on the members might be served either personally, or by leaving the same, or sending them through the post in a letter addressed to the members, at their registered place of abode respectively."

Studer had not for some years had any connection with 9, *Bruton Street,* though he had formerly carried on business there. He was now usually abroad, and he had on the occasion of an application to remove his name from the list of contributories in June, 1874, given his address *Coburg Hotel, Charles Street, Grosvenor Square.*

Mr. *Winslow,* Q.C., and Mr. *Robertson Griffiths,* for the petitioning creditors, in support of the appeal:—

There was a service at the last-known place of abode, for the last-known place of abode must mean the last place of abode known to the creditor. The service was in the mode directed by the articles, and is therefore good service: *Copin* v. *Adamson* (1); *In re Williams* (2); *In re Holt* (before *Bacon,* C.J., Jan. 27, 1873). At all events, while the order for substituted service stands, service pursuant to it must be treated as good service.

Mr. *De Gex,* Q.C. (Mr. *H. D. Greene* with him), for the Respondent:—

The question of the validity of the service is open on a petition

(1) Law Rep. 9 Ex. 345. (2) Law Rep. 8 Ch. 690.

for adjudication notwithstanding the order: *Ex parte O'Loghlen* (1). [He was here stopped by the Court.]

Mr. *Winslow*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Registrar is right. The debtor summons was served at 9, *Bruton Street*, which for years had not been the debtor's place of residence or business. The service was made in pursuance of an order for substituted service; but that order was grounded solely on a clause in the articles of association which provided that service of notices on a member at his registered address should be good service. A convention of that kind between a company and its members cannot prevail to make a service of legal proceedings at that address good. Then it was said that this was the last-known place of abode of the debtor. There was no evidence to that effect before the Registrar, and although the debtor, in an affidavit made in the course of the winding-up proceedings, had described himself as residing at the *Coburg Hotel*, the liquidators take another address, apparently for the purpose of raising this question. The order for substituted service was clearly erroneous; and I am of opinion that its validity is open on the present occasion, and that service under it must be treated as ineffectual. The appeal must be dismissed with costs.

Solicitors: Messrs. *G. S. & H. Brandon;* Messrs. *Vallance & Vallance.*

(1) Law Rep. 6 Ch. 406.

L. JJ.
1875
Feb. 11.

MIDDLEMAS *v.* WILSON.

[1873 M. 128.]

Practice—Appeal from part of Decree—Right of Respondent to open the whole Decree—Order on Motion and Decree drawn up together.

A motion by Defendants to expunge evidence for scandal and impertinence was ordered to stand over till the hearing of the cause. At the hearing a decree was made both on the hearing and on the motion, by which substantial relief was given, and the motion was refused, and the evidence sought to be expunged was entered as read. The Plaintiff appealed from part of the decree, which was varied by the Lords Justices :—

Held, that the whole decree was open to the Respondents on the appeal, and on their application the order on the motion was reversed, and the evidence directed to be expunged.

Decree of *Bacon*, V.C., varied.

THIS was an appeal from a decree of Vice-Chancellor *Bacon*.

The Plaintiff, Mr. *R. Middlemas*, in the year 1858, entered into partnership with Mr. *J. A. Wilson*, the Defendant to the original bill, as solicitors, at *Alnwick*, in *Northumberland*. The articles of partnership provided for a dissolution at any time by either party at his pleasure upon giving six months' notice to his co-partner.

In the year 1872 Mr. *Wilson* got into pecuniary difficulties, and in the month of February, 1873, he became affected in his mind, and was for three months under the care of a keeper. On the 17th of May, 1873, Mr. *Middlemas* served on Mr. *Wilson* a written notice to dissolve partnership from that date, alleging as the ground for dissolution certain defalcations on the part of Mr. *Wilson* with respect to sums of money intrusted to him. Some of these sums Mr. *Wilson* had received on account of the partnership firm, and others in respect of offices which he held independently of the firm.

On the 21st of May, 1873, Mr. *Wilson* left *Alnwick*, and was afterwards for some time confined in a lunatic asylum.

On the 28th of May, the Plaintiff filed his bill, praying that the partnership might be declared to have been dissolved from the date of the notice, and that the usual accounts might be taken.

On the 1st of August Mr. *G. A. Watson* was appointed the guardian *ad litem* of Mr. *Wilson*.

On the 23rd of December the Plaintiff gave notice of motion for decree in terms of the prayer, having filed certain affidavits in support of his bill, which were answered by affidavits on the part of the Defendant.

On the 2nd of March, 1874, the Plaintiff filed an affidavit in reply to the evidence of the Defendant, in the seventh paragraph of which he stated various other defalcations which he alleged to have been committed by the Defendant *Wilson*, and which he had discovered quite recently, but which he stated on the information of others, and not on his own knowledge. At the same time an affidavit was also filed on behalf of the Plaintiff by *J. Brewis*, stating, on the information of another person, a transaction in which dishonesty was imputed to *Wilson*.

On the 1st of April, 1874, *Wilson* filed a petition for liquidation, and *G. A. Watson* and *J. Winter* were appointed trustees of his estate, and they were made Defendants to the suit by supplemental order.

On the 31st of July, 1874, the Defendants moved before the Vice-Chancellor that the affidavit of *Brewis* and the seventh paragraph of the affidavit of the Plaintiff of the 2nd of March, 1874, might be taken off the file as scandalous and impertinent, but the Vice-Chancellor ordered the motion to stand over till the hearing of the cause.

On the 3rd of November, 1874, the cause was heard before the Vice-Chancellor, when His Honour admitted the evidence complained of, and made no order on the motion to expunge that evidence; and he declared that the partnership should be dissolved from the date of the decree, and directed the usual accounts (1).

The Plaintiff appealed from so much of the order as declared that the partnership should be dissolved as from the date of the

(1) 1874. Nov. 3. The decree as drawn up was as follows:—Upon motion for decree this day made by counsel for the Plaintiff, and upon hearing counsel for the Defendants, and upon motion this day made unto this Court by counsel for the Defendant, *J. A. Wilson*, by *G. A. Watson*, his guardian *ad litem*, and the said *G. A. Watson* and *J. Winter*, that the affidavit of *John Brewis*, filed in this cause on behalf of the Plaintiff on the 2nd of March, 1874, might be taken off the file of this Court as being scandalous and

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decree only, and that an account should be taken of the assets of the partnership. No appeal was brought against the refusal by the Vice-Chancellor to expunge the affidavit of *J. Brewis* and the seventh paragraph of the affidavit of the Plaintiff.

Mr. *Jackson*, Q.C., and Mr. *Caldecott*, for the Appellant, contended that, independently of the power in the articles, the misconduct of *Wilson* operated as a dissolution of the partnership.

The LORDS JUSTICES refused to allow the affidavit of *Brewis* and the seventh paragraph of the Plaintiff's affidavit of the 2nd of March, 1874, to be read as evidence.

Mr. *Kay*, Q.C., and Mr. *Russell Roberts*, for the Defendants, the trustees in the liquidation, after arguing the case upon the merits, asked that an order might be now made for expunging the affidavit of *Brewis* and the seventh paragraph of the Plaintiff's affidavit, for scandal and impertinence. The Plaintiff having appealed from part of the decree, it was open to the Respondents to object to any part of the decree as drawn up: *Watts* v. *Symes* (1). The refusal of the Defendants' motion had been made part of the decree; and, besides, the two affidavits had been entered as evidence in the decree, and the Defendants were entitled to have them struck out.

Mr. *Jackson*, Q.C., and Mr. *Caldecott*, for the Appellant, contended that the order refusing the motion, although drawn up on the same

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impertinent, and that the whole of the seventh paragraph of the affidavit of the Plaintiff filed on the 2nd day of March, 1874, might be expunged, as being scandalous and impertinent, and that the Plaintiff, on whose behalf the said affidavits were filed, might be ordered to pay the costs of and occasioned by such affidavits, and the costs of the said application as between solicitor and client; and upon hearing counsel for the Plaintiff, and upon reading (*inter alia*) the said affidavit of *J. Brewis* and the said affidavit of the Plaintiff filed the 2nd of March, 1874, this Court doth not think fit to make any order upon the said motion; and the Court doth declare that the partnership in the Plaintiff's bill mentioned should stand and be dissolved as from this day, and doth order and decree the same accordingly; and it is ordered that the following accounts be taken, &c.

(1) 1 D. M. & G. 240.

piece of paper, was not part of the decree. The motion was entirely distinct from the motion for decree, and was only heard at the same time as a matter of convenience. The Defendants ought to have renewed the motion by way of appeal in this Court.

Mr. *Hubert Lewis*, for the Defendant *Wilson*.

SIR W. M. JAMES, L.J., after stating his opinion that on the result of the evidence no such misconduct on the part of the Defendant *Wilson* had been proved as to justify the Court in declaring the partnership dissolved from the date of the notice; but that the partnership ought to be declared dissolved as from the 1st of April, 1874, the date of the presentation of the petition for liquidation, continned:—

Another question related to the motion of the Defendants to take the affidavit of *Brewis* and the seventh paragraph of the Plaintiff's affidavit off the file. According to the practice which is usual, although, perhaps, the effect of such practice is that the interlocutory motions are not always so carefully considered as they otherwise might be, this motion was ordered to stand over till the hearing of the cause—not till the day of hearing, but till the hearing—to be then dealt with as the Court might think fit. It was then dealt with, and a decree was made both upon the motion for decree and upon this motion. The Plaintiff appealed from part of the decree, and the Respondents now say that that being so, the whole decree is open, and that they are entitled to have that motion disposed of by us. I am of opinion that they are so entitled. These affidavits allege gross misconduct against a Defendant without any previous notice given to the Defendant, and based only upon hearsay. Such allegations are not evidence, and the affidavit and paragraph complained of ought not to have been put upon the file. I am of opinion that they ought to be expunged, with the usual consequence of payment of costs between solicitor and client by the party who filed them.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Shum, Crossman, & Crossman*; Mr. *R. W. Busby*.

L. JJ.
1874
Nov. 25.

In re SCARTH.

Creditor—Detinue—Trover—Damages.

Where a verdict at law has been obtained for £100 in default of delivery of a chattel to the Plaintiff, he cannot, before issuing execution, be considered as a creditor of the Defendant for the £100.

IN 1873, *Frederick Green* brought an action of detinue against *T. H. Scarth* for the recovery of the lease of a house, and on the 17th of April obtained a verdict for £100, to be reduced to nothing if the lease was given up, and 40*s.* damages for its detention, and costs. The costs were taxed at £75, and *Green* entered up judgment for £177. On the 4th of May an order was made by Mr. Justice *Keating* staying execution on the judgment, except as to the costs, until the 30th of May.

On the 5th of May *Scarth* filed his petition for liquidation by arrangement, and on the 1st of June the first meeting of creditors was held, and was adjourned to the 30th of June. In the meantime, but after the 30th of May, the missing lease had been found, and was by *Scarth* tendered to *Green's* solicitor, who refused to receive it. At the adjourned meeting all the creditors agreed to accept a composition of 2*s.* 6*d.* in the pound, and resolutions to that effect were carried.

The same resolutions were approved of at a second meeting, *Green* dissenting. *Green* had claimed to prove for the £177, and if he had a right to prove for this sum, the resolutions were not passed by a sufficient majority of creditors.

The Registrar considered that *Green* was a creditor for £77 only, and refused to register the resolutions.

From this decision the debtor appealed.

Mr. *T. Brett*, for the Appellant:—

This is not a judgment for £100, but for a lease, with £77 costs and damages. The lease has been tendered, and if it had been accepted there would be no pretence for saying that more than £77 was due. From events which have occurred the lease has become valueless, but *Green* cannot claim the £100.

[The LORD JUSTICE MELLISH observed that the *postea* seemed to be erroneous in form, and to be of the form in an action of trover and not of detinue.]

Mr. *Bagley*, for *Green*:—

The debtor has put this creditor to every possible expense and inconvenience, and the liquidation is merely a scheme to prevent him from getting anything.

SIR G. MELLISH, L.J.:—

The question in this case is, whether a particular creditor at the meeting had a right to prove for £177 or for £77 only. Mr. *Green* brought an action of detinue, and obtained a verdict, and the jury found the value of the lease to be £100. Mr. Justice *Keating* made an order that execution in respect of the £100 should be stayed if the debtor should give up the lease. The time had, however, expired before the first meeting of creditors took place, and therefore *Green* was entitled to issue execution as to the £100; as to the costs, he could always have issued execution. We must consider whether, under these circumstances, *Green* was a creditor entitled to prove for the £100. The old writ under a verdict in an action of detinue authorized the sheriff to distrain the goods and chattels of the Defendant if he did not return the goods or pay a certain sum of money. This gave the Defendant the choice whether he would give up the goods or pay the money, and drove into equity all who wanted to recover the actual goods. But the *Common Law Procedure Act*, 1854, altered this, and enabled the Courts of Common Law to make an order for the return of the goods. All this shews that until execution has issued, a judgment creditor in an action of detinue is unable to get the money, and that the property in the goods remains in him. Therefore, at the time when the first meeting of creditors was held, this lease was still the property of the creditor. To hold, under these circumstances, that he could prove for £100, might, in this particular case, be beneficial to the creditor, as the lease happens to be worth very little; but in most cases the goods sought to be recovered are of value, and in such a case it would be very hard on their owner to hold that he must prove

L. JJ. 1874 *In re* SCARTH.

for their value, and thus give up his right to his goods. It is obvious that he could not be entitled to both the goods and the money, and to hold that, on the bankruptcy of the debtor, the creditor could prove for the money would be holding that he was not entitled to recover the goods.

It is the duty of the trustee to return the lease to the creditor, but the creditor, having the lease, cannot prove for its value. In my opinion the debt was not a good debt as to the £100; there was therefore the requisite majority of creditors in number and value, and no reason why the resolutions should not be registered.

The order made by the Registrar will be discharged, and there will be no costs of the appeal.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Messrs. *Harris & Finch*; Mr. *W. J. Hobbes.*

L. JJ. 1875 *Jan.* 18; *March* 10.

VYSE *v.* FOSTER.

[1870 V. 28.]

Practice—Appeal—Proceedings in Chambers—Adjourned Summons—Decision by Judge in Court—15 & 16 *Vict. c.* 80, *s.* 33.

Where a Judge has decided on an adjourned summons a question which has arisen in proceedings in his Chambers, but no order has been drawn up, no appeal can be brought from his decision.

THIS was an appeal from a decision of Vice-Chancellor *Bacon.*

By the decree, on the hearing of the cause, made by the Lords Justices on the 14th of December, 1872 (1), which was subsequently affirmed by the House of Lords, an inquiry was directed what was the amount of the Plaintiff's share of the residuary estate of the testator, *R. Vyse,* and what part of the said share had from time to time since his death remained in the hands of the successive firms of *Vyse & Sons,* and *Vyse, Sons, & Co.*

(1) Law Rep. 8 Ch. 309.

In the prosecution of this inquiry a summons was taken out, which was adjourned into Court for hearing an application on the part of the Defendants that, for the purpose of the inquiries directed by the decree and the proceedings thereunder, the balance-sheet of the partnership taken on the 30th of June, 1855, might be treated as conclusive evidence of the value, at the testator's death, of the testator's share in the partnership property.

The Vice-Chancellor, on the 28th of May, made no order on the summons, but directed that the costs should be costs in the cause. His Honour at the same time gave his opinion that the valuation referred to in the summons was not binding on the Plaintiff, and that a proper fresh valuation ought to be made. His Honour remitted the matter to his Chief Clerk with an intimation of his opinion.

The solicitors for the Defendants applied to the Plaintiff's solicitor to have the decision of the Vice-Chancellor drawn up, in order that they might appeal against it, which he refused to do, considering that no formal order had been made, and that the proper course would be to wait till the Chief Clerk had made his certificate, when either party might take out a summons to vary it.

The Defendants therefore appealed from the decision without any order being drawn up.

Mr. *Jackson*, Q.C., and Mr. *Kekewich*, for the Appellants.

Mr. *Kay*, Q.C., and Mr. *Romer*, for the Plaintiff, took a preliminary objection to the hearing of the appeal, that no order had been drawn up:—

The decree of the Vice-Chancellor was merely a direction to his own Chief Clerk as to the conduct of the matter in Chambers. If the Appellants think it erroneous they will have an opportunity of objection to the certificate when it is made. If each matter of detail, in taking the accounts, was treated as an order of the Court and made the subject of appeal, the delay and expense would be enormous: *Morgan* v. *Hatchell* (1); *Rhodes* v. *Rhodes* (2).

(1) 19 Beav. 86. (2) Law Rep. 1 Ch. 483.

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Mr. *Jackson*, Q.C., and Mr. *Kekewich*, for the Appellants :—

This is not a mere matter of detail, but of principle, on which the whole course of taking the accounts depends. If the Vice-Chancellor's decision stands, great expense will be incurred, which will be saved if our view of the effect of the valuation in question be correct. Under the 15 & 16 Vict. c. 80, s. 33, any party, during the proceedings before the Chief Clerk, is at liberty to take the opinion of the Judge upon any particular point or matter occurring in the course of the proceedings. When the opinion of the Judge is taken in this manner, it has always been usual to draw up an order, and such orders have constantly been the subject of appeal. It is no fault of ours that no order has been drawn up; we applied to the Plaintiff to have it drawn up, but he refused.

Sir W. M. James, L.J. :—

Who is to determine in what cases an appeal should be brought? Is there to be an appeal in every case in which the Judge has expressed an opinion? In my opinion it is for the Judge to say that the matter is of such importance that in the discharge of his duty he will make an order in such a way that it may be capable of being appealed from. There has been no order, or anything equivalent to an order, in this case. If the Vice-Chancellor thinks it a proper thing to be brought to the Court of Appeal he will direct an order to be drawn up.

Sir G. Mellish, L.J., concurred.

Mr. *Jackson* asked for the matter to stand over to make another application to the Vice-Chancellor, so as to enable them to draw up an order.

The Lords Justices having consented to this course, the Defendants on the 10th of February made their application by motion before the Vice-Chancellor *Bacon* in Court. His Honour refused to make any order, except that the costs were to be costs in the cause, and an order was passed accordingly.

The Defendants appealed, and the appeal motion came on to be heard on the 10th of March.

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Mr. *Cotton*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Kekewich*, for the Appellants.

Mr. *W. Pearson*, Q.C., and Mr. *Ince*, for the Respondents.

The LORDS JUSTICES were of opinion that the partnership accounts could not be gone into in this suit; and made an order that the balance-sheet of 1855 should be taken as conclusive evidence of the testator's share in the partnership assets.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Mr. *S. J. Robinson;* Mr. *F. A. K. Doyle.*

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[1871 W. 151.]

Practice—Evidence—Proof of Handwriting at the Hearing—Discretion of the Court—Documents scheduled to Affidavit—Proof of—Election by Conduct.

2 Ch D 39

The Court has a discretion whether it will allow documents to be proved at the hearing under an order of course obtained at the Rolls Court.

Where a party, during the hearing of a cause, obtained an order of course to prove a letter in support of one of the main issues in the cause, no notice having been given to the other side of his intention to use the letter in evidence, the Court refused to allow the letter to be proved.

A document described in Plaintiff's affidavit of documents as "Copy of a letter from Plaintiff to Defendant," and produced at the hearing, cannot be read by the Defendant, the original not having been proved.

Semble, that no documents so scheduled by one party can be read by the other party without regular proof.

In order to establish a case of election by conduct, it must be shewn that the person bound to elect has full knowledge of his rights, and acted with an intention to elect.

Decision of *Malins*, V.C., affirmed.

THIS was an appeal from a decree of Vice-Chancellor *Malins*.

The case made by the bill as amended was as follows:—

The Plaintiff *Mary Ann Wilson* and her first husband, *William Cook*, in the month of June, 1861, went to reside with Mr. *David Thornbury*, who was a connection of *W. Cook*, at *Washingborough* in *Lincolnshire*.

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In the year 1864, *W. Cook*, being in bad health, gave up a farm which he had previously held, and which had been managed for him for some time past by *D. Thornbury*, and received as part of the value of the stock from the incoming tenant a sum of £500, which he gave to *D. Thornbury* for the purpose of building or buying a house for himself, *Cook*, and his wife.

Thornbury being unable to buy a house at *Washingborough*, gave *Cook* a piece of land in *Lamb's Yard*, close to his own house, and expended the £500 in building a house on it, which was furnished by *Cook* and his wife. They did not, however, occupy it, but continued to reside with *Thornbury*.

No conveyance was made of the house or land to *Cook*, and the original bill did not state any memorandum in writing respecting the application of the sum of £500; but the amended bill stated that on the 12th of September, 1864, *Thornbury* gave to the Plaintiff *Mary Ann Wilson* the following written memorandum, which the Plaintiff had discovered since the filing of the original bill:—

"*Washingborough*, September 12, 1864.

"Memorandum that I have this day received from Mr. *W. J. Hunt* for Mr. *W. Cook* the sum of £500, the said sum to be paid by me into the bank for the purpose of building or buying a house for the said *W. Cook*. I also agree to pay him 5 per cent. interest on the said sum.

"*David Thornbury.*"

This memorandum was all in the handwriting of the Plaintiff, *Mary Ann Wilson*, except the signature.

In September, 1867, *W. Cook* died, having by his will given all his real and personal estate to his wife.

D. Thornbury made his will, dated the 21st of May, 1870, and thereby devised to the Plaintiff *Mary Ann Wilson* (then *Mary Ann Cook*) the house in *Lamb's Yard* for her life, if she should so long continue the widow of *W. Cook*, and after her death or second marriage he devised the same to his son, *David Featherby Thornbury*, for his life, and after his death to his children and their heirs as tenants in common, with remainders to the Defendant *David Thornbury Batty* and his children. He also devised the rest of his estate in *Lincolnshire* to his said son for life, with the same limi-

tations over. And he also bequeathed the dividends of a sum of £200 *Great Northern Railway* Stock, and an annuity of £70 charged on his *Lincolnshire* estate, to *Mary Ann Wilson*, for her life, if she should so long continue the widow of *W. Cook*. The testator gave the residue of his real and personal estate to his said son; and he appointed the Defendants, *T. Wise*, *W. Gee*, and *G. Wise*, executors of his will.

The testator died on the 14th of November, 1870. There was evidence that the will was read to the Plaintiff *Mary Ann Wilson* soon after the testator's death, and that she said on that occasion that she was satisfied with its provisions as she did not mean to marry; and she was also furnished with a copy of that part of the will which related to the bequest of the annuity, but it did not appear that she had ever received a copy of the entire will.

On the 10th of March, 1871, the Plaintiff wrote to *D. F. Thornbury* a letter, in which she informed him that she had had an offer of marriage. The letter contained the following passage:—

"I have lately received an offer of marriage, but I have declined giving a final answer while I consulted you. I cannot possibly bring my mind to the idea of renouncing all my claim to what your father has left me; indeed, after ten years of constant anxiety and nursing, I do not feel it would be justice to myself to do so. Besides, I have a mother to provide for. At the same time, if you and the trustees would take the matter into consideration and grant me a suitable marriage gift, to be secured to myself, I would forego any further claim. You will think me very explicit. I deemed it best to be so. The gentleman is desirous for my answer; it rests on your reply."

In answer to this letter *D. F. Thornbury* promised her a sum of £300 on her marriage.

The Plaintiff, also, on the 30th of March, 1871, wrote a letter to the Defendant *D. T. Batty*, in which she said:—

"You are aware that under Mr. *Thornbury's* will there is a contingency attached to my annuity; and of course I am aware, should I marry, I should be a great burden on the estate removed. I cannot but feel, after my ten years of constant nursing and care, that it is cruel that such an unreasonable contingency was made; still it is so. I have lately received an offer of marriage, and I

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have appealed to *Featherby's* generosity in case I should accept it, and he has promised me £300 as a marriage gift; he would, he said, have promised more, but he considers his life uncertain, and that the next heir would reap the benefit. I know full well, dear Mr. *Batty*, that at the present time, had you the desire to assist me, you could not, neither would it be to your present interest to do so. You are aware on what terms this house was built, and that poor Mr. *Cook* died in the full belief that it was my own. Now I am going to venture to ask you, should you come into possession of this estate before my death, would you grant me the house while I live? I ask for nothing more. I have been very plain, but I deemed it best to be so."

In reply to this, *D. T. Batty* wrote to the Plaintiff on the 31st of March, 1871, as follows:—

"We have not the least hesitation in granting your request as regards the house, and, as far as we are concerned, you are free to use the house as long as you live. The best way for you to do would be to get my cousin to give you a lease at a nominal rent (say one shilling per year), which I will continue, if it please God that I come into possession before your decease."

The Plaintiff *Mary Ann Wilson* was married to her present husband, the Plaintiff *William Wilson*, on the 16th of May, 1871.

One half year's payment of the annuity was paid to Mrs. *Wilson*, according to a direction contained in the will, soon after the testator's death, and another half year's payment, which became due on the 14th of May, was paid to her soon after her marriage.

At the time of her marriage *D. F. Thornbury* paid the £300 to her trustee according to his promise, and she gave up possession of the house to him.

Soon after the marriage a correspondence commenced with respect to the right of *M. A. Wilson* to the house; and on the 23rd of November, 1871, the Plaintiffs filed their original bill against *D. F. Thornbury*, *D. T. Batty*, and the trustees of the will, praying that the testator might be declared a trustee for *W. Cook* of the house in *Lamb Yard*, or in the alternative, that the Plaintiffs might be declared entitled to the sum of £500 received by the testator for the purpose of building the house.

The Defendants put in their answer, in which they refused to

admit the Plaintiff's claim either to the house or to the sum of £500, and also insisted that if she had any such claim she had elected to take the benefits given to her under the will, and to give up all such claims as were made by the bill.

The Defendants contended that the signature of the testator to the memorandum of the 12th of September, 1864, was a forgery, and applied for an issue to be tried before a jury to determine the genuineness of that document. This was refused by the Vice-Chancellor, except on the terms of the Defendants paying the costs of the trial, but was ordered by the Lords Justices on appeal; but their Lordships directed that the Defendants should advance £100 to the solicitors of the Plaintiffs to defray the costs of their witnesses, such sum to be dealt with subsequently as the Court should direct.

The issue was tried at the Summer Assizes of 1874, at *Lincoln*, when the jury found a verdict establishing the genuineness of the document.

Both parties went into evidence, which was very voluminous, on the question whether the Plaintiff *Mary Ann Wilson* had or not elected to take the benefits under the will, in the course of which the before-mentioned facts were proved, and a great number of letters and other documents were put in evidence.

When the cause came on for hearing on the 23rd of November, 1874, the Defendants called for production of a document dated the 8th of June, 1871, which was described in the schedule of the Plaintiffs' affidavit of documents as "Copy of a letter from the Plaintiff *Mary Ann Wilson* to *D. F. Thornbury*." The document was produced, and the Defendants then proposed to read it as a copy admitted by the Plaintiffs, and proposed to take the same course as to the other documents specified in the said schedule. The Vice-Chancellor refused to allow the documents to be read. The Defendants then, while the hearing was proceeding, obtained, *ex parte*, an order at the Rolls Court to prove the handwriting of certain letters and other documents, including an original letter dated the 9th of June, 1871, from the Plaintiff *Mary Ann Wilson* to *D. F. Thornbury* (of which the said copy described the 8th of June, 1871, was said to be a copy with an error as to date), at the hearing, by affidavit or by examination of witnesses *viva voce*.

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The order was produced at the hearing, and the Defendants tendered evidence of the handwriting of the letter of the 9th of June, 1871; but the Vice-Chancellor was of opinion that it was in the discretion of the Court to act or not on such an order, and refused to allow the letter to be proved.

As the result of the verdict it was not disputed that the house belonged to *W. Cook.*

The Vice-Chancellor held that the Plaintiff *Mary Ann Wilson* had not elected to take the benefits under the testator's will, and was now entitled to elect to retain the house; and he made a decree declaring that the testator was a trustee of the house for *W. Cook,* and ordering the Defendants to convey it to the Plaintiffs, the Plaintiff *Mary Ann Wilson* repaying what she had received in respect of the annuity; and he made no order as to the £100 advanced in respect of the expenses of the witnesses at the trial.

The Defendants appealed from this decree, and also from the other holdings of the Vice-Chancellor.

Mr. *Glasse,* Q.C., and Mr. *Hemming,* for the Appellants:—

Before arguing the case on the merits, we ask permission to read the documents admitted by the Plaintiffs to be in their possession, but which the Vice-Chancellor refused to allow to be read, and also to prove *vivâ voce* the letter of the 9th of June, 1871, and the other documents included in our order of the 23rd of November, 1874.

With respect to the first class of documents, it has never been doubted that if a Defendant in his answer sets out a document which he admits to be in his possession, that document may be read as evidence by the Plaintiff without more formal proof. And the same practice holds as to documents admitted by a Defendant to be in his possession and mentioned in the schedule to his answer. Why should not the same practice apply to documents scheduled by a Plaintiff as being in his possession?

[The LORD JUSTICE JAMES:—I know of no authority for the proposition that documents admitted either by a Plaintiff or a Defendant to be in his possession, and simply referred to in a schedule, can be read in evidence without further proof.

The LORD JUSTICE MELLISH:—The Plaintiff by his affidavit

only admits that the pieces of paper are in his possession; he does not admit their genuineness.]

In the case of this particular document, the Plaintiffs describe it in their schedule as a copy of a letter from one of themselves to the Defendant. That is an admission that it is such a copy, just as much as if the admission had been contained in the answer itself. The new practice of 1852, which withdrew statements as to documents from the answer to an affidavit, has never been understood as altering in any way the effect of an admission of a document.

Then with respect to the documents, particularly the letter of the 9th of June, 1871, in our own possession, we are entitled to prove them *vivâ voce* at the hearing. They come out of the proper custody, and require no proof except that of the handwriting. In such a case it has never been doubted that it is a matter of right for a party in a suit to obtain an order even while the cause is being heard, and prove the document at the hearing: *Daniell's* Chancery Practice (1). In this case there has been no surprise upon the Plaintiff, for the Defendants' answer disclosed the case of election which they intended to set up, and many of the letters included in our order of course were proved at the trial at *nisi prius*, although not formally proved in the suit.

Mr. *Higgins*, Q.C., and Mr. *Dundas Gardiner*, for the Plaintiffs:—

The mere fact of documents being admitted to be in the possession of a party to the cause, does not make them evidence, unless they are proved or admitted in the proper way. We should have had no objection to produce them if notice had been given, and we could have had an opportunity of explaining them.

With respect to the letter of the 9th of June, 1871, and the other documents in the Defendants' possession, it is a matter for the discretion of the Court whether leave should be given to prove documents at the hearing or not. According to the ordinary practice the order is obtained and notice served on the other side before the hearing; otherwise the Court ought not to permit it, unless the documents are purely formal. In the present case, we were quite taken by surprise, for the defence of election, as we under-

(1) 4th Ed. p. 816.

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stood, was given up when the Defendants set up the defence of forgery. The power of proving documents at the hearing would be an instrument of great injustice if documents relating to the main issue in the cause were kept back till the last moment and then proved in this manner.

Mr. *Glasse*, in reply:—

There is no necessity to give notice to produce scheduled documents, because the order under which the affidavit is made directs them to be produced at the hearing. Papers referred to by an answer are read as part of it, and the affidavit now takes the place of the answer: *Marsh* v. *Sibbald* (1).

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor on both points was right. The only question on which there could be any doubt is whether, without the exercise of any discretion on the part of the Court, a party is entitled to obtain *ex parte* at the Rolls Court a common order to prove documents at the hearing, and the Court is compelled to allow them to be proved at the hearing. No doubt it is a common practice, when nothing but the handwriting of a document is to be proved, to allow evidence of that to be given at the hearing; but here the document sought to be proved is to establish a main issue in the cause. The issue tendered by the Defendants is, that by certain correspondence and conduct of the Plaintiff she has exercised an election. That being so, it would be a monstrous injustice if, after the Defendants have given notice of their intention to read a mass of correspondence on which they rely to establish their case, and having put this correspondence in evidence, then at the very last moment, when the counsel on the other side have opened their case, dwelling on the evidence of which notice has been given, other evidence should be slipped in on an essential issue. I think the Court has a right to say that such a course shall not be pursued. No injustice can be done by giving such a discretion to the Court; because if any particular piece of evidence is tendered and objected to as not strictly proved, and there has been a slip, and when the document

(1) 2 V. & B. 375.

itself has been referred to in the pleadings, and the substance of it drawn to the attention of the other party, the Court will always allow the defect to be cured, and will, if necessary, itself call a witness and examine him *vivâ voce*. That was the proper course to be adopted here, and not to get an order *ex parte* at the Rolls to prove about forty documents, and claim to prove them in Court at the last moment. I think, therefore, that in this case the Vice-Chancellor was quite right in not allowing it to be done. I am of opinion that the Vice-Chancellor was quite right in not acting on the order obtained at the Rolls Court in this case.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Mr. *Glasse*, Q.C., and Mr. *Hemming*, then proceeded to argue the case on the merits:—

The Plaintiff *Mary Ann Wilson* must be taken to have elected by her conduct and correspondence. The evidence shews that she had a knowledge of the contents of the will. Moreover, she had a perfect knowledge that the house was hers, and that a paper had been signed in her presence proving it to be so. Knowing this, though she says she had not then found the paper, she acquiesces in the disposition in the will, abstains from claiming the house, acknowledges that it is not hers, and obtains a gift of £300 on the footing of giving up possession, which she does. With all this knowledge she received the annuity: *Worthington* v. *Wiginton* (1); *Streatfield* v. *Streatfield* (2). It is true that one payment of the annuity was made after her marriage, but a married woman may exercise an election: *Ardesoife* v. *Bennett* (3). However, we say that the election was complete before she made up her mind to marry, and then it was too late to retract. Her correspondence with the Defendants *D. F. Thornbury* and *Batty*, and before her marriage, shewed she had at that time a knowledge of her rights, and that she was conscious that she had elected. If she then intended to claim the house she was deceiving the Defendants, and at all events the sum of £300 paid by *D. F. Thornbury*

(1) 20 Beav. 67. MS. 1005.
(2) 1 W. & T. L. C. 3rd Ed. p. 303.
(3) 2 Dick. 463.

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in satisfaction of all her rights ought to be repaid as having been obtained by fraud.

Mr. *Higgins*, Q.C., and Mr. *D. Gardiner*, for the Plaintiffs, were not called on.

SIR W. M. JAMES, L.J.:—

I think the Vice-Chancellor's decision was clearly right. As to the question of election, I should have been surprised at the tenacity with which it was argued before the Vice-Chancellor and here, except that the fever arising from the heated atmosphere of the Assize Court has not yet quite subsided.

There is in this case not the slightest trace of what the Court calls election by conduct. Election by conduct must be by a person who has positive information as to his rights to the property, and with that knowledge really means to give that property up. All that we have in this case is that this lady claimed certain property, but had no means of establishing her right unless she could find a written paper. No written paper was discovered till long after her marriage. Then, having at the time no means of proving her rights, and having heard the will read to her, she says she is satisfied with its provisions. That amounts to nothing. Then she receives one payment of the annuity before she had made up her mind to marry. After she had made up her mind to marry it cannot be supposed that she would deliberately take property which would cease on her marriage in place of that which was her own absolutely. Such a contention would be idle. There was, in my opinion, nothing approaching to a distinct knowledge of her position, or a deliberate intention to elect.

There being, then, no election, what is to become of the sum of £300? In my opinion that was a marriage present. After the Plaintiff had made up her mind to marry, she made an appeal *ad misericordiam* to the person entitled to the property out of which the annuity was payable. In order to obtain a repayment there must be a misrepresentation amounting to deception. There was nothing of the kind here. She said she would have had this property if she had not married, and now she was going to lose it. That only shews she was under a mistake. All her conduct which

was relied on as strong evidence before the jury to shew that she did not claim the house is equally strong now to shew that she did not then know that she had a right. That prevents there having been any fraudulent misrepresentation. It was simply a voluntary gift founded on a common mistake, and cannot now be recovered. It may be hard upon the Defendant that he has lost this money, but it was the testator's fault in dealing with property that did not belong to him: and he might have easily avoided the difficulty by stating that the benefits given to the Plaintiff by his will were to be in full satisfaction of her claim on the house. We are bound by the finding of the jury to assume that her story about the trust and of her subsequent finding of the document is true.

With respect to the £100 advanced by the Defendants towards payment of the Plaintiff's witnesses, I am not disposed to interfere with the Vice-Chancellor's discretion.

SIR G. MELLISH, L.J.:—

I am of the same opinion. With respect to the question of election, we have to see whether the Plaintiff knew what her rights were, and what the material facts on which they depended were, and whether, knowing them, she determined to elect. I think it is proved that she heard the will read, but I doubt whether she understood it, or whether she had such a knowledge of the contents of the will as to amount to knowledge of her rights under it. But it is not necessary to come to a conclusion on that point, for I think it clear that she did not know what her rights in the house were. It was very difficult for her to find out what the facts were, and difficult to prove what her rights were. The house was built on land of the testator, and therefore *primâ facie* was his property; but it was built with money borrowed from her husband: and the testator had executed a document which had not then been found. Under these circumstances it appears to me that she cannot be said to have known that the house was hers till some time after the marriage; and therefore she cannot have elected, because she had not sufficient knowledge of her rights.

I also agree with reference to the sum of £300. I have doubts whether it was not given in respect of the annuity without reference to the house. She asked to be allowed to have the house for life,

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and a present in consideration of the loss of the annuity. Therefore I think the present was not made in respect of the house. At all events, there was no fraudulent conduct or misrepresentation. She had no knowledge at that time what her rights were.

I also agree as to the sum of £100 advanced by the Defendants.

The appeal must be dismissed with costs.

Solicitors: Messrs. *Collyer-Bristow, Withers, & Russell;* Messrs. *Swann & Co.*

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MARSHALL *v.* SHREWSBURY.

[1873 M. 11.]

Mortgage—Dismissal of Bill for Redemption—Equitable Mortgage by deposit of Deeds—Foreclosure—Consolidation of Mortgages.

Ch D. 447

The rule that the dismissal of the bill in a redemption suit operates as a foreclosure of the mortgage does not apply to an equitable mortgage by deposit of title-deeds.

A mortgagor filed a bill for the redemption of a legal mortgage. The mortgagee, by his answer, alleged that he had advanced another sum of money on the deposit of the title-deeds of another estate, and he claimed to hold both estates till both debts were paid. The Plaintiff amended his bill by stating the allegations made by the Defendant, but before the bill came to a hearing he obtained an order, *ex parte*, dismissing the bill with costs. The mortgagee afterwards contracted to sell both the estates, and then filed a bill for the administration of the estate of the mortgagor, who was dead, praying for permission to carry out the sale, and for payment of his whole debt out of the mortgagor's estate:—

Held (affirming the decision of *Hall*, V.C.), that the equitable mortgage was not foreclosed, and that the Plaintiff was entitled to the relief prayed for.

THIS was an appeal from a decision of Vice-Chancellor *Hall*.

In the years 1843 and 1844 the Plaintiff, *William Marshall*, and *George Stevens*, jointly advanced various sums amounting to £240 to *Thomas Gillett* on the security of three conditional surrenders of certain copyhold lands at *Burntfen*, in the *Isle of Ely*, containing 13A. 2R. 18P. *George Stevens* died in October, 1854; and, on the 11th of April, 1855, the Plaintiff was admitted tenant of the land under these conditional surrenders.

The Plaintiff also advanced various other sums of money to *T. Gillett*, amounting, as he alleged, to £707, on the security of the deposit of the deeds and documents relating to a copyhold house at *Littleport*, called the *Porched House*, which the Plaintiff had in his possession as *Gillett's* solicitor, *Gillett* promising to execute a legal mortgage when required; but no legal mortgage was ever executed of this property.

Gillett died on the 28th of September, 1851, having by his will given all his real and personal estate to *W. Shrewsbury*, upon trust to sell and convert the same into money, and after paying his debts, funeral and testamentary expenses, to hold the residue of the proceeds upon the trusts therein mentioned.

On the death of *Gillett*, *Marshall* entered into possession as mortgagee of the copyhold lands, and also of the *Porched House*, but gave them up again to *W. Shrewsbury* in 1858.

In July, 1870, *W. Shrewsbury* filed a bill against *Marshall* for the redemption of the copyhold lands at *Burntfen*. *Marshall* put in his answer, setting up the subsequent advances which he had made on the security of the deposit of deeds, and claiming to be paid the whole debt of £947 advanced on the two estates, with a large sum for interest.

W. Shrewsbury amended his bill, introducing a statement that "the Defendant alleges that he advanced and paid to or for the use of the said *T. Gillett* several sums of money amounting to £707; and that previously to such advances it was agreed between him and the said *T. Gillett* that such advances, with interest at £5 per cent., should be secured by the retainer by the Defendant of all papers and documents of the said *T. Gillett* then in the Defendant's possession relating to certain portions of the said *T. Gillett's* property at *Littleport* aforesaid." The bill, as amended, prayed for an account of what was due to the Defendant for principal and interest under "his said security or securities," and for redemption in the usual form. Both parties went into evidence, and replication was filed, and the cause was set down for hearing; but the Plaintiff, being advised that the property charged would not cover the principal and interest, obtained an order, *ex parte*, on the 30th of October, 1871, under which his bill was dismissed with costs.

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W. Shrewsbury died in December, 1871, having by his will devised all his trust estates to his daughter, *Mary Flanders*, the wife of *J. M. Flanders*, who were Defendants to the present suit.

On the 29th of February, 1872, the Plaintiff *Marshall* agreed to sell the *Burntfen* lands and the *Porched House* to *J. M. Flanders* for £1050. The contract recited the order of the 30th of October, 1871, and recited that the said order had the effect of a decree for foreclosure upon the merits; but, on the 18th of January, 1873, before the sale was completed, *Marshall* filed the present bill against *J. M. Flanders* and his wife, and the executors of *W. Shrewsbury*, claiming the sum of £947 and interest as a debt against the estate of *Thomas Gillett*, and praying that he might be at liberty to complete the sale of the property comprised in his mortgage securities, and that the rest of the testator's real estate (the personal estate being insufficient) might be sold for payment of the Plaintiff and the other creditors of the testator.

The Defendants put in their answer to the bill, in which they submitted that the dismissal of the bill in *Shrewsbury* v. *Marshall* by the Plaintiff *Shrewsbury* operated as a decree for foreclosure of the said mortgaged premises; and that *Marshall*, by his contract for the sale of the property, had debarred himself from now recovering the alleged debt; they also relied upon the Plaintiff's delay in filing the bill.

The Vice-Chancellor made a decree directing an account of what was due to the Plaintiff in respect of his advances, except the sum of £240; and, after directing the usual inquiries as to the real estate of the testator, directed that the real estate should be sold and the proceeds paid into Court to the credit of the cause.

From this decree the Defendants appealed.

Mr. *Dickinson*, Q.C., and Mr. *Graham Hastings*, for the Appellants:—

By Cons. Ord. XXIII. rule 13, the dismissal of the bill in the previous suit had the same effect as a dismissal at the hearing. It therefore amounted to a decree for foreclosure, and the debt is merged as to both estates: *Cholmley* v. *Countess of Oxford* (1);

(1) 2 Atk. 267.

Inman v. *Wearing* (1); and the Plaintiff has admitted this by his contract to sell the estates. When a mortgagee puts the estate out of his power, so that he cannot restore it to the mortgagor, the relation of mortgagor and mortgagee is finally closed. The foreclosure cannot, therefore, now be opened: *Walker* v. *Jones* (2); *Hansard* v. *Hardy* (3); *Lockhart* v. *Hardy* (4); *Palmer* v. *Hendrie* (5). There is no distinction in principle between the dismissal of the bill for redemption in the case of a legal and of an equitable mortgage. In both cases the Plaintiff, by filing his bill, admits the existence of the debt and the charge on the estate, and by dismissing his bill he admits his inability to redeem the estate. It is true that the form of a decree for foreclosure in the case of an equitable mortgage is different from that in the case of a legal mortgage, because it is necessary for the equitable mortgagee to get a conveyance of the legal estate; but the distinction is only formal, and the effect is the same in both cases, namely, foreclosure of the estate and merger of the debt: *Parker* v. *Housefield* (6); *James* v. *James* (7). In the present case there is the additional circumstance that the mortgagee claimed to consolidate the two debts, and they were treated by both parties as one debt. It is contrary to all principle that the mortgagee should now claim to separate the debts again, and to say that the dismissal of the bill should operate as a foreclosure as to one security and not as to the other.

Mr. *Lindley*, Q.C., and Mr. *Cookson*, for the Plaintiff, were not called on.

SIR W. M. JAMES, L.J.:—

I have really not been able to bring my mind to entertain any doubt of the correctness of the decree of the Vice-Chancellor. There is no doubt that it is an established rule of the Court that if a mortgagor files his bill for the redemption of a legal mortgage, and it is dismissed for any reason except for want of prosecution,

(1) 3 De G. & Sm. 729.
(2) Law Rep. 1 P. C. 50, 61.
(3) 18 Ves. 455.
(4) 9 Beav. 349.
(5) 27 Ibid. 349.
(6) 2 My. & K. 419.
(7) Law Rep. 16 Eq. 153.

(1) 1 C 12 Jur N.S. 381.

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the dismissal operates as a decree for foreclosure against him. That rule is recognised by both text-books and authorities. The mortgagor, by filing the bill, admits the title of the mortgagee, and admits the mortgage debt, and the dismissal of the bill operates as a decree for foreclosure, because he cannot afterwards file another bill for the same purpose; he is not allowed thus to harass the mortgagee.

With regard to an equitable mortgage, I have never met with a bill by an equitable mortgagor for redemption, though such a bill might probably be filed. But how could the dismissal of such a bill operate as a decree for foreclosure? The only thing foreclosed would be the right to redeem certain pieces of parchment. It may be that the Plaintiff would be barred from bringing another bill to redeem those pieces of parchment, but that is all. When an equitable mortgagee files a bill to enforce his security, he does not get a simple decree for foreclosure, but he gets further substantial relief. He is entitled to have a declaration that his deposit operated as a mortgage, and that in default of payment of what may be found due, the mortgagor is a trustee of the legal estate for him; and then the decree goes on to order the mortgagor to convey the estate to him. Now, to say that because dismissal of a bill for redemption operates as a decree for foreclosure in the case of a legal mortgage, therefore the analogy would be good that the dismissal of a bill by an equitable mortgagor has the same effect, is to say that the dismissal of the bill is to be held equivalent to a declaration that the mortgagee has a lien for the amount claimed, and that the mortgagor is a trustee for him, and is bound to convey the estate to him. There is no authority for saying that a mere dismissal is an equivalent to such a comprehensive decree. In the present case the mortgagor files a bill for the redemption of a legal mortgage for an admitted debt of £240. The Defendant puts in an answer in which he says, "I have another security on which I have advanced another sum of money." If he could prove that, he would be entitled to say that the mortgagee shall not redeem one estate without redeeming the other. The mortgagor does not file a bill saying, "I admit that you hold both securities, and I ask to redeem both together," but only says, "The Defendant has one estate, and he claims to have another; and I am willing

to redeem estate *A.*, and also estate *B.* if he proves his mortgage upon it." Then the Plaintiff changes his ground and dismisses his bill. In my opinion, that dismissal could not prevent him from setting up the defence on a subsequent occasion that there was really no such equitable mortgage, but the deeds were deposited for another purpose. The dismissal of the bill has left the right undetermined. It did not give the mortgagee the relief to which he was entitled in a foreclosure suit. Therefore it is impossible to attribute to it the same effect as a decree for foreclosure. If the mortgagee by his conduct had mixed up two mortgages, it may be that the mortgagor would have a right to say, "You must open the foreclosure altogether, and I will redeem the whole." But it is not so here. If there is any complication, it is because the mortgagor has dismissed his own bill. There is no authority or principle in favour of that which has been contended before us. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitor for the Appellants: Mr. *T. M. Wilkin.*
Solicitor for the Plaintiff: Mr. *T. H. Bartlett.*

Ex parte SIR WILLIAM RUSSELL.
In re SIR WILLIAM RUSSELL.

Liquidation—Discharge of Debtor—After-acquired Property—Resolutions passed for Benefit of Debtor—Bankruptcy Act, 1869, *s.* 125.

A debtor having commenced proceedings for liquidation, his creditors passed a resolution that his discharge should be granted to him on his paying £4000 in a month, and giving a bond for payment of £5000 more to the trustee by five yearly instalments. In default of payment of any instalment, the whole £5000 was to become payable at once. The £4000 was paid, the bond given, and two yearly instalments paid under it, but default was made in payment of the third. The debtor then commenced fresh proceedings for liquidation, and presented a statement of accounts shewing a large amount of debts and hardly any assets. He was in receipt of half-pay as a retired officer in the army. The creditors passed a resolution that the affairs of the debtor should be liquidated by arrangement; that until full payment of the

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debts the debtor should pay to the trustee the excess of his income above £600 a year; and that as soon as a deed had been executed to carry the above resolutions into effect the debtor should, without any further resolution, be discharged from the debts. The trustee under the former liquidation proved for the £3000, and voted for the resolutions without the consent of the committee of inspection, and without his vote the resolutions would not have been passed. The Registrar having refused to register these resolutions:—

Held, that after the £4000 mentioned in the former resolutions had been paid and the bond given the future property of the debtor was released, and that the former liquidation was not pending so as to prevent the debtor from instituting fresh proceedings for liquidation:

Held, also, that the trustee under the former liquidation had all the rights of a creditor for £3000, and that his vote in the second liquidation was effectual whether his voting as he did was a breach of trust or not:

But, *held*, that the resolutions under the second proceedings were manifestly not passed for the benefit of the creditors, but for the sake of discharging the debtor, and therefore were not binding on dissentient creditors, and that on this ground they ought not to be registered.

THIS was an appeal by Sir *William Russell* from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge, refusing to register resolutions passed on the 30th of July, 1874, by a statutory majority of his creditors.

In 1870 Sir *W. Russell*, a retired colonel in the army, who traded as a shipowner, instituted proceedings for liquidation of his affairs by arrangement under the *Bankruptcy Act*, 1869; and on the 15th of June, 1870, the following resolutions were duly passed:—

"1. That the affairs of the said Sir *W. Russell* (hereinafter called the debtor) shall be liquidated by arrangement, and not in bankruptcy.

"2. That *C. F. Kemp* be hereby appointed trustee.

"3. That *L. Winterbotham*, *W. S. Fladgate*, and *A. Lawrie* be, and they are hereby appointed, a committee of inspection.

"4. That the discharge of the said debtor shall be granted to him upon payment being made on his behalf to the trustee of the sum of £4000 within one calendar month after the registration of this resolution; or if the order for registration shall be appealed from, then within one calendar month after final confirmation thereof, and upon the said debtor executing within the same period a deed of covenant (or, if the committee of inspection shall think fit,

a bond) to the trustee for payment to the trustee of the sum of £5000 by five equal annual instalments, the first payment to be made at the expiration of twelve calendar months after the date of such deed or bond, and the subsequent payments at successive periods of twelve calendar months, commencing from the date of such first payment, but such deed or bond shall provide that if default be made in payment to the trustee of any of the said instalments or any part thereof respectively for twenty-one days after the time for payment thereof, the whole of the then unpaid instalments shall at once become due and payable.

"5. That in case default shall be made by the said debtor in payment of the said sum of £4000, any or either of the creditors may present a petition for adjudication of bankruptcy, or make such application as they or he may think fit against the debtor that he may be adjudicated a bankrupt under sub-sect. 12 of sect. 125 of the *Bankruptcy Act*, 1869, and the debtor and the trustee shall respectively consent to such adjudication being forthwith made.

"6. That in case default shall be made in payment of either of the said annual instalments, the trustee, on being thereto required by any creditor, shall institute and duly prosecute proceedings in bankruptcy against the debtor in respect of the balance of the instalments then remaining unpaid.

"7. That the said several instalments, and also the said sum of £4000, shall be applied by the trustee as part of the estate of the said debtor, and the payment of the said sum of £4000 shall be taken to be in satisfaction and discharge of any right or obligation on the part of the trustee or any of the creditors to make any application to the Court of Bankruptcy under the 89th section of the *Bankruptcy Act*, 1869, as to the pay or half-pay of the said debtor."

These resolutions were duly registered, and within one month after the registration Sir *W. Russell* paid the £4000 to the trustees, and executed the deed provided for by the resolutions. On the 12th of August, 1870, a certificate of discharge was given him by the Bankruptcy Court. He paid two of the yearly instalments provided for by the deed, but failed to pay that for 1873.

In 1874 Sir *W. Russell* again resorted to proceedings for liquidation by arrangement or composition. The statement of his

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affairs shewed unsecured debts, £41,373; secured debts, £30,250; partially secured creditors, £1300; value of their securities, £400; leaving a balance of £900. Creditors for rent, rates, taxes, and wages, £482; liabilities on bills discounted, £11,707; of which it was expected that £9297 would be proved. The total of debts to be proved thus amounted to more than £50,000. The assets were—book debts estimated to produce £350; bills of exchange and other securities estimated at £1334; surplus of property held by secured creditors, £250. Total, £1934.

Sir *W. Russell* was in receipt of half-pay as a retired colonel.

On the 30th of July, 1874, a statutory majority of creditors passed resolutions:—1. That the affairs of Sir *W. Russell* should be liquidated by arrangement. 2. That *Kemp* should be appointed trustee. "3. That until full payment of all the debts proveable under the liquidation, the debtor shall pay to the trustee by equal half-yearly payments (commencing at six months from the date of the registration of these resolutions) so much of the income of the debtor as shall (reckoning from the date of such registration) exceed £600 per annum." 4. That as soon as the debtor and trustee should have executed a deed to give effect to the resolutions, the debtor should be discharged, without any further resolution for the purpose, from all debts proveable under the liquidation; such discharge to be subject to the condition that it should be void if the debtor should fail to perform any of the covenants on his part contained in the deed, and the trustee should certify in writing that in his opinion such failure was wilful.

The trustee, who had never been asked by any of the creditors to take proceedings in bankruptcy, proved under the second liquidation for the £3000 which remained due under the first liquidation, and voted in favour of the resolutions, which would not otherwise have been carried. This vote was given without the assent of the inspectors appointed under the first liquidation.

The Registrar refused to register the resolutions on the ground that the first liquidation was not closed. Sir *W. Russell* appealed.

Mr. *De Gex*, Q.C., Mr. *Bagley*, and Mr. *R. T. Raikes*, for the Appellant:—

The resolutions under the first liquidation released the debtor

upon his complying with certain conditions with which he has complied; and that liquidation therefore is at an end. Even if it were not, the creditors under the first liquidation could not sweep away all the assets from subsequent creditors. The subsequent bankruptcy of an uncertificated bankrupt was valid. *Troughton* v. *Gitley* (1); *Re Rawbone's Trust* (2); *Morgan* v. *Knight* (3). This case is distinguishable from *Ex parte Sydney* (4), for that was a case of composition.

Mr. *Little*, Q.C., and Mr. *F. H. Linklater*, for dissentient creditors:—

This case is governed by *Ex parte Sydney*. The debtor could not take the initiative in this proceeding till the first liquidation had closed. The proceedings could only be closed by a resolution of the creditors: *In re Bennett's Trusts* (5); and no such resolution has been passed. Until then all property vests in the trustees. The terms of the first resolution have not been fully complied with, for, on a fair construction, they were not complied with until payment of the whole £5000.

[The LORDS JUSTICES referred to *Ex parte Tinker* (6).

Marshall v. *King* (Queen's Bench, 17th Nov., 1874) was also referred to.]

Then, again, the trustee had no right to vote as he did without the assent of the inspectors: *Bankruptcy Act*, 1869, ss. 20, 25, 27; so the resolutions are not duly passed. Again, we say that this is a case where there are no assets, and the resolutions have not been passed *bonâ fide* for the benefit of the creditors, but only for the purpose of exonerating Sir *W. Russell*: *Re Ash* (7).

Mr. *Jeune*, for another dissentient creditor.

Mr. *De Gex*, in reply.

SIR G. MELLISH, L.J.:—

This is an appeal from an order of the Registrar refusing to

(1) Amb. 630.
(2) 3 K. & J. 476.
(3) 15 C. B. (N.S.) 669.
(4) *Ante*, p. 208.
(5) Law Rep. 19 Eq. 245.
(6) Ibid. 9 Ch. 716.
(7) Roche & Hazlitt's Bnkcy. 432.

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register certain resolutions passed by the creditors of Sir *William Russell*, who presented a petition for liquidation. The ground on which the Registrar refused to register the resolutions was, that there was a former liquidation the proceedings in which were pending. If the proceedings really were pending I should be of opinion, in conformity with what we decided in the case of *Ex parte Sydney* (1), which was a case of composition, that it was not competent for Sir *William Russell* to present a fresh petition; but I think the test of whether the former liquidation was pending or not would be, whether his future acquired assets still remain liable to the creditors of the old liquidation. It appears to me that if the future acquired assets remain liable to the creditors of the old liquidation (whether under such circumstances there might be a fresh bankruptcy or not, upon the ground of the trustee having allowed him to deal with his assets, it is not necessary now to consider), the debtor could not present a fresh petition for liquidation. On the other hand, if the creditors under the first liquidation had discharged the future-acquired assets, then it appears to me that the subsequent creditors must be, of course, entitled to the future assets, and must be entitled to proceed in bankruptcy; and if they are entitled to proceed in bankruptcy, I do not see why the debtor, having assets and having creditors, should not be allowed to present a petition for liquidation if the majority of the creditors thought fit to have his estate distributed in the ordinary way of liquidation.

The question to be determined therefore is, whether, having regard to the resolutions under the old liquidation, the future estate of Sir *William Russell* was discharged. Now, that the creditors have power, in the case of a liquidation by arrangement, to discharge the future estate, if they make proper resolutions for the purpose of discharging it, I think is clear from sect. 125, sub-sect. 9, which enacts that "The provisions of this Act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement, but the close of the liquidation may be fixed and the discharge of the debtor and the release of the trustee may

(1) *Ante*, p. 208.

be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution at such time and in such manner and upon such terms and conditions as the creditors think fit." It seems clear from the terms of that provision that if the creditors had resolved that the debtor should be discharged, and that the liquidation should be considered as closed from a certain day, then, although the whole of the estate might not at that time have been distributed, yet nevertheless the future assets would be free from the previous liquidation. In the case of *Ex parte Tinker* (1) we held, that although the creditors had passed no formal resolution either for the discharge of the debtor or for the close of the liquidation, nevertheless if they had so dealt with the debtor by selling his assets to him that it would be plainly contrary to good faith as between them and the debtor that they should claim his future acquired property, the future acquired estate was freed from the former debts.

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Now the fourth resolution in this case provides that the discharge is to be granted "upon payment being made on his behalf to the trustee of the sum of £4000 within one calendar month after the registration of this resolution, or if the order for registration shall be appealed from, then within one calendar month after final confirmation thereof, and upon the said debtor executing within the same period a deed of covenant (or, if the committee of inspection shall think fit, a bond) to the trustee for payment to the trustee of the sum of £5000 by five equal annual instalments," the times for payment of which are then mentioned. A subsequent resolution then provides "that in case default be made by the debtor in payment of the said sum of £4000, any or either of the creditors may present a petition for adjudication of bankruptcy, or make such application as he or they may think fit." The sixth resolution provides "That in case default be made in payment of either of the said annual instalments, the trustee shall, on being thereunto required by any creditor, institute and duly prosecute proceedings in bankruptcy against the said debtor in respect of the balance of the instalments then remaining unpaid." It appears to me that the construction of these resolutions is perfectly plain. The

(1) Law Rep. 9 Ch. 716.

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debtor was to pay £4000 down and to execute a deed, but if he paid the £4000 and executed that deed, then he was to get an order for discharge. The payment of the £4000, and the execution of the deed covenanting to pay the £5000 by instalments, were the terms of a purchase, so to speak, as between him and his creditors of his future estate. The difference between the provision in case of the £4000 not being paid and in case of the £5000 not being paid, makes that still more clear. In case the £4000 is not paid, then any of the creditors may take proceedings to make him bankrupt at once, that is to say, upon the act of bankruptcy committed by his presenting his petition for liquidation; but if he pays the £4000, and gives a deed, then if he makes default in payment of any of the instalments the consequence is that the whole £5000 becomes payable, and the trustee, if he is asked by any of the creditors, may take proceedings in bankruptcy against Sir *William Russell*, plainly contemplating a fresh proceeding in bankruptcy by the trustee as a creditor for the £5000, not proceedings in bankruptcy under the old act of bankruptcy, for the debtor would be discharged from all the debts due at the time when the old act of bankruptcy was committed, and therefore could not be made a bankrupt upon the old act of bankruptcy, there being no provision that the discharge is to become invalid. The creditors having agreed to give Sir *William Russell* credit for the £5000, and having accepted the covenant as the price of the future assets, cannot at the same time say that all the assets belong to them, and that the subsequent creditors are not to share. It therefore appears to me to be quite clear that the effect of these resolutions was that the future assets of Sir *William Russell* belonged to him, and do not belong to the creditors. That being so, it was competent, as far as that objection is concerned, for Sir *William Russell* to take the proceedings for liquidation.

The second objection made was that the vote of the trustee who voted for the liquidation, and whose vote was necessary to make the proper majority, ought not to be counted, because he had not got the assent of the inspectors. I am of opinion that that objection cannot prevail. I think all the different sections in the *Bankruptcy Act*, as to what a trustee may do or may not do when

he requires the assent of the inspectors and of all the creditors, have really nothing to do with this case, in which the creditors have chosen, in respect of a certain sum for which they have given credit to the debtor, to take the security of a deed by which the debtor covenants that at a certain future time he will pay a certain sum to the trustee. That makes the trustee a creditor, and whatever the ordinary rights of a creditor are, it appears to me he has those rights, and whether it would or would not be a breach of trust as between him and the creditors to vote without consulting the inspectors, he is plainly in the ordinary position of a creditor entitled to vote.

The third objection, as it appears to me, deserves very great consideration, viz., that the resolutions were not resolutions *bonâ fide* passed for the benefit of the creditors and for the purpose of distributing Sir *William Russell's* assets amongst them, but were passed exclusively for the benefit of Sir *William Russell.* By the statement of the accounts presented at the meeting, it appears that there are practically no assets, not exactly none at all, but so trifling that anybody acquainted with proceedings of this nature must see that, practically, there will be no dividend. Substantially the only property of Sir *William Russell* is his half-pay as a colonel, a portion of which, under the Act of Parliament, might possibly be applied for paying his creditors.

Under these circumstances the creditors come to resolutions not merely that there shall be a liquidation by arrangement, but that the debtor shall receive his order of discharge at once on his executing a deed by which he is to be allowed to receive £600 a year from any source of income that he may have, and covenants only that all beyond £600 a year he will pay over to his creditors. Practically, the first effect of that is he clears his half-pay from paying anything towards his creditors, and he is to keep enough for him to live upon without the slightest security that the creditors will ever get anything. I do not say that there is anything wrong, morally speaking, in the creditors coming to that resolution. I think that being likely to get little under any circumstances, the creditors may have been desirous to discharge him. But it seems to me that it is impossible to suppose that the majority of the creditors would come to such

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a resolution as that *bonâ fide* for what they considered the best for the creditors. It appears to me manifest that the majority of the creditors have been actuated by kindly motives towards Sir *William Russell*, and I think a resolution of that kind cannot stand against the objection of the dissentient creditors. The Act of Parliament enables a certain majority of creditors to bind the minority, but it must be a majority who are *bonâ fide* voting for what they consider to be for the benefit of the creditors, and with a view of making the best arrangement for the creditors, and if it is made plain that the resolutions come to are not made *bonâ fide* for the benefit of the creditors, but with the intent to discharge the debtor without any real benefit to the creditors, then, in my opinion, the minority of the creditors are entitled to object to the registration of such resolutions. I am, therefore, of opinion that the order of the Registrar refusing to registrar these resolutions must be affirmed, and that this appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Messrs. *Linklater, Hackwood, & Co.;* Messrs. *Cope, Rose, & Pearson.*

L. JJ.
1875
Feb. 12.

Ex parte HARRIS. *In re* HARRIS.

Bankruptcy—Debtor's Summons—Bankruptcy Act, 1869, *ss.* 6, 7, 8, 9.

H., in October, 1874, was served with a debtor's summons for a sum alleged by *C.* to be due to him on the balance of an account. On the 1st of December an application by *H.* to dismiss the summons was refused with costs, on the ground of a defect in the jurat of his affidavit. *C.* on the following day presented a petition for adjudication. *H.* gave notice to dispute the debt and the act of bankruptcy. On hearing the petition on the 17th of December, the Registrar ordered *H.* within seven days to enter into a bond with two sureties for £400 to pay what *C.* might recover in an action, and stayed proceedings in bankruptcy till the action had been tried. Seven days having elapsed without the bond being given, *C.* served

notice of motion to proceed in bankruptcy, and on the hearing of the motion the Registrar, without entering into the merits, adjudged *H.* bankrupt:—

Held, on appeal, that the order for adjudication was wrong, for that the debt not having been established at law, it was the duty of the Registrar to investigate the account and decide whether a debt sufficient to support an adjudication was due.

THIS was an appeal by Mr. *Harris* from an order of Mr. Registrar *Pepys*, sitting as Chief Judge, by which he was adjudged a bankrupt.

On the 31st of October, 1874, a non-trader debtor's summons was issued by *Cockle* against *Harris* for £517 0*s.* 3*d.*, and was served on the same day. On the 21st of November, 1874, *Harris* filed an affidavit that he was not indebted to *Cockle* in the amount claimed in the summons. On the 1st of December the debtor's application to dismiss the summons was refused with costs, on the ground that the jurat in the above affidavit was defective, as it only stated the affidavit to have been sworn "this day of November, 1874."

On the 2nd of December, 1874, *Cockle* presented a petition for adjudication, which was served on the same day. The 17th of December was fixed for hearing the petition, and before this day had arrived *Harris* gave notice to dispute the debt and the act of bankruptcy. On the 17th Mr. Registrar *Pepys* made an order directing *Harris* within seven days to enter into a bond with two sufficient sureties in the penal sum of £400 to pay such sums as should be recovered by the Petitioner, and costs; and directing that upon such bond being entered into, proceedings in bankruptcy should be stayed until the Court in which the proceedings for the debt should be taken should have come to a decision thereon. No bond having been given, *Cockle*, after the 24th of December, served notice of motion to proceed in bankruptcy; and on the 14th of January, 1875, the motion came on to be heard. The debt alleged by *Cockle* to be due to him was the balance of an account of some length, the items on one side of which amounted to £4035 0*s.* 4*d.* and those on the other to £3518 0*s.* 1*d.* *Harris* appeared and tendered an affidavit by which he denied his liability to many of the items, and stated that an investigation of the account, which was for the most part in respect of buildings in the erection of

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which *Cockle* had been employed for *Harris*, would shew that the balance was against *Cockle*. Mr. Registrar *Pepys*, on the ground that the bond had not been given, made an order of adjudication, without receiving the affidavit or entering into the question of the accuracy of the account.

Mr. *Harris*, in person, in support of the appeal.

Mr. *R. T. Reid*, for the petitioning creditor:—

The affidavit of the 21st of November was inadmissible, owing to the imperfection in the date of the jurat: *Duke of Brunswick* v. *Harmer* (1).

[The LORD JUSTICE MELLISH:—Why should not such a slip be corrected by its being re-sworn in Court?]

The Court is not disposed readily to dismiss a debtor's summons since the question of debt can be tried afterwards: *Ex parte Lowenthal* (2). The bond not having been given, the debtor was properly adjudged bankrupt.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order for adjudication must be discharged, and the matter referred back to the Registrar for him to go into the question of debt. He held that it must be tried by an action, and ordered security to be given. Security was not found, and the action was not tried. In such a case the Court of Bankruptcy must try it. The Registrar, instead of making an immediate order of adjudication, ought to have gone into the account in the same way as a Chief Clerk would do, and to have ascertained whether there was a debt sufficient to support an adjudication.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Nash, Field, & Mathews.*

(1) 19 L. J. (Q.B.) 456. (2) Law Rep. 9 Ch. 324.

Ex parte HANKIN. *In re* BUCHAN.

L. JJ.
1875
March 4.

Bankruptcy—Protected Transaction—Notice of Act of Bankruptcy—Non-compliance with Debtor's Summons—Bankruptcy Act, 1869, *ss.* 6, 94.

The non-compliance with a debtor's summons is a completed act of bankruptcy available against the debtor for adjudication on the expiration of the time limited by the *Bankruptcy Act*, 1869, s. 6, sub-s. 6. Therefore, if notice of such non-compliance be given to another creditor before any petition for adjudication has been filed, it will prevent such creditor from availing himself of the protection of sect. 94.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

On the 23rd of July, 1874, Messrs. *Hankin & Sleeman* sued out a debtor summons against Mr. *James Buchan*, a wine merchant in *London*, for a debt exceeding £50.

On the 25th of July, 1874, Mr. *Rumpff*, another creditor, sued out another debtor's summons against *Buchan* for a debt of £69.

The debtor failed to comply with either of these debtor summonses.

On the 11th of August *Hankin & Sleeman* presented a petition for adjudication of bankruptcy against *Buchan*.

On the 15th of August *Rumpff* gave notice to *Hankin & Sleeman* of the act of bankruptcy committed by *Buchan* in not complying with his debtor's summons.

On the 1st of September *Buchan* paid *Hankin & Sleeman* the sum of £102, the amount of their debt and costs; and on the 3rd of September, the day appointed for the hearing of the petition for adjudication, the petition was dismissed on the application of the petitioning creditors.

On the 28th of September, 1874, *Rumpff* filed a petition for adjudication against *Buchan*, founded on his debtor's summons; and on the 26th of October, 1874, *Buchan* was adjudicated bankrupt.

The trustee applied to the Court for an order directing *Hankin & Sleeman* to repay to him the sum of £102 received from the bankrupt, as having been paid by them with notice of an act of bankruptcy committed by the bankrupt. The Registrar made

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the order applied for, and *Hankin & Sleeman* appealed from this decision.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellants:—

At the time when the payment was made to *Hankin & Sleeman* they had no notice of "an act of bankruptcy available for adjudication" within the meaning of the 94th section of the *Bankruptcy Act*, 1869, and are therefore protected by that section. The alleged act of bankruptcy in this case was not completed till the creditor *Rumpff* filed a petition for adjudication against the debtor, which was not done till the 28th of September, four weeks after the payment complained of. The non-compliance with the debtor's summons was not an act of bankruptcy available for adjudication to the general body of the creditors, but only to *Rumpff*, and if he had not thought fit to file a petition, it would not have been an act of bankruptcy at all. If the Registrar's construction is correct, a creditor who has sued out a debtor's summons may defer filing a petition for six months, and prevent the debtor from paying anything to, or having any dealings with, his other creditors in the meantime.

Mr. *Roxburgh*, Q.C., and Mr. *Doria*, for the trustee, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Registrar was quite right in this matter. It is said that certain injurious consequences would result from this view of the law. But these consequences necessarily result from the enactment, by which no creditor can take advantage of a debtor's summons except the creditor who sues it out. So that if any injurious consequences should result, they can only be prevented by application to the Legislature for an alteration in the law. The words of the Act are clear. The act of bankruptcy is complete on the expiration of seven days from the service of the summons. It is impossible to contend that it is not complete till the filing of the petition; if so, there would be no time from which the six months within which the petition must be filed would run. That being so, the payment must be void unless

L. JJ. 1875 *Ex parte* HANKIN. *In re* BUCHAN.

it comes within the 94th section, which protects payments made in good faith to a creditor without notice of an act of bankruptcy committed by the bankrupt and available against him for adjudication. This act of bankruptcy was available against him for adjudication. The Act does not say "available for all the creditors generally;" if so, there might have been a difficulty. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The 11th section of the Act provides that the bankruptcy shall be deemed to commence from the completion of the act of bankruptcy. That must be from the expiration of the time limited for compliance with the debtor's summons. It cannot mean the filing of the petition, for the reason stated by the Lord Justice. The only question, then, is whether the case comes within the protection of the 94th section. There is no distinction made in that section between an act of bankruptcy under a debtor's summons and any other act of bankruptcy. I think it must, therefore, apply to that as well as to others.

Solicitors: Mr. *H. I. Coburn;* Messrs. *Chauntler, Crouch, & Spencer.*

Ex parte BARRON. *In re* IRVING.

L. JJ. 1875 *March* 4, 11.

Bankruptcy—Debtor's Summons—Proof of Debt—Right of Debtor to summon Creditor for Examination—Bankruptcy Act, 1869, s. 7.

Where a debtor's summons has been issued and the debtor denies the debt, he has no absolute right to require the attendance of the summoning creditor for the purpose of examination.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

On the 10th of December, 1874, *P. Barron* and *F. Roman*, Spanish merchants, carrying on business at *Almeria*, in *Spain*, under the firm of *Barron & Co.*, sued out a debtor's summons against *J. Irving*, a colonial broker in *London*, for a debt of £178.

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The affidavit on which the summons was issued was made by *C. O. McAllum*, who stated therein that he was authorized by Messrs. *Barron* by a power of attorney to make the affidavit, and that it was within his own knowledge that the debt was incurred, and for the consideration therein stated.

On the 24th of December *Irving* appeared, and made an affidavit that he was not indebted to Messrs. *Barron* in the sum claimed in the summons. The 5th of February, 1875, was appointed for the debtor to make his application to dismiss the summons.

On the 26th of January the debtor served on the creditors' solicitor a notice for *P. Barron* and *F. Roman* to attend on the 5th of February to be examined. On that day, the debtor stating that he desired to examine the creditors, the Registrar held that the debtor was entitled, *ex debito justitiæ*, to the attendance of the creditors, and adjourned the hearing till the 4th of March for their attendance. From this order the creditors appealed.

The Appellants' case was supported by an affidavit, from which it appeared that the Appellants resided at *Almeria*, in the south of *Spain*, and that neither of them had any personal knowledge of the transaction which was the subject of the summons.

Mr. *Finlay Knight*, for the Appellants:—

It is most unreasonable to insist on the attendance of the creditors personally when they know nothing personally of the facts of the case, especially when they reside in a foreign country. In proving a debt the creditor's attendance may be dispensed with under the 40th rule of the *Bankruptcy Rules*, 1870.

Mr. *Yate Lee*, for the debtor:—

The process by debtor's summons is a statutory remedy, and the rules of procedure ought to be strictly construed. The debtor has a right, *ex debito justitiæ*, to the personal attendance of the creditors. The rules and forms are all drawn on that supposition.

[SIR G. MELLISH, L.J., referred to *Ex parte Hare* (1).]

It is not sufficient for the creditors' agent to make an affidavit; he may know that the debt was incurred, but he cannot possibly

(1) Law Rep. 10 Ch. 218.

be sure that it has not been repaid. The debtor is obliged to deny the debt on oath; that puts the burden on the creditor of proving it strictly.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Registrar has miscarried in this case. The only real question is whether, the moment a debtor has denied a debt claimed in a debtor's summons, he is instantly entitled as a matter of right to have all the summoning creditors summoned from any part of the world to be examined, although they may have made no affidavit on which they can be cross-examined. There is no injustice or hardship upon the debtor in saying that he has no such right. When the debtor has put in his affidavit denying the debt, the creditor is bound, just as in an action, to prove it to the satisfaction of the Court. He must either prove it absolutely, or he must prove it so far as to induce the Registrar to direct the question to be tried at law. The debtor can cross-examine the agent of the creditor, and he can tell his own story as to what occurred between himself and the creditor. But it would be monstrous if a debtor had an absolute right to summon any number of partners who are creditors to attend and be examined, merely because he wished it. The Registrar's order must be discharged. The debt must of course be proved before him properly, and if the creditors do not appear, the debtor will have this advantage, that his statement of the facts will be uncontradicted.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Nash, Field, & Mathews;* Messrs. *Linklater, Hackwood, & Co.*

L. JJ. 1875 March 13.

In re GREEN (A PERSON OF UNSOUND MIND NOT SO FOUND). *In re* MURTON'S TRUSTS.

Trustee Act—Appointment of New Trustee—Trustee of Unsound Mind—Service.

Where a petition is presented for the appointment of a new trustee under the *Trustee Act*, 1850, in place of a trustee of unsound mind not so found, service on the trustee of unsound mind is not necessary.

UNDER an indenture of settlement, dated the 9th of February, 1836, certain leasehold estates and sums of stock in the public funds were vested in three trustees upon the trusts therein declared. The settlement contained a power to appoint new trustees in the place of any who should die or become unwilling or unable to act, which was vested in the trustee or trustees for the time being, or in the executors or administrators of any surviving trustee.

Two of the trustees died, and the surviving trustee became of unsound mind, but was not so found by inquisition.

Some of the persons beneficially entitled under the will now presented a Petition under the *Trustee Act*, 1850, and in the matter of the person of unsound mind, praying that three new trustees might be appointed in the place of the two deceased trustees and of the person of unsound mind, and that an order might be made vesting the property in the new trustees. The other *cestuis que trust* were served with the Petition, but not the trustee who was of unsound mind.

Mr. *Morshead*, for the Petitioners, submitted that service on the trustee of unsound mind was not necessary. He referred to *In re East* (1), in which case, however, the Court was only asked to make a vesting order, a new trustee having been previously appointed by the continuing trustees.

Mr. *Bunting* appeared for the Respondents.

THE LORDS JUSTICES thought it was unnecessary to serve the person of unsound mind, and made the order asked for.

Solicitors: Messrs. *Sole, Turner, & Knight*; Messrs. *Newbon & Co.*

(1) Law Rep. 8 Ch. 735.

In re MASON (A PERSON OF UNSOUND MIND).

L. JJ.
1875
March 22.

Appointment of new Trustees—Lunatic Devisee of a Trustee.

A testator devised real estate to trustees, their heirs and assigns, upon certain trusts. The surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A Petition was presented for the appointment of new trustees, and for the appointment of a person to convey on behalf of the devisees of the surviving trustee:—

Held, that the Petition was properly presented in Lunacy as well as in Chancery.

THIS was a Petition presented in Lunacy and Chancery for the appointment of new trustees of the will of *James Blyth*.

The testator devised certain real estate to *Godfrey* and *Lawson*, to hold the same to them, their heirs and assigns, upon trust to pay one moiety of the rents to, or permit them to be received by, his daughter, *Ellen Blyth*, for life, and during coverture to her separate use without power of anticipation; and after her death he directed that one moiety of the estate should remain upon trust for her child or children who should attain twenty-one or marry, in equal shares, and his, her, or their heirs and assigns; and as to the other moiety, upon similar trusts for another daughter and her children. The power of appointing new trustees was given to the surviving or continuing trustee or trustees, or if none, then to the retiring trustee or trustees, or if none, then to the executors or administrators of the last deceased trustee. The testator bequeathed his personal estate to the same trustees upon trusts for his widow for life, and then for a third daughter and her children.

Lawson, the surviving trustee, died in 1871, leaving a will by which he devised all trust estates to *George Mason* and two other persons, and appointed them his executors. This will was proved by all three executors.

George Mason had become of unsound mind, though not found so by inquisition, and the two other devisees refused to act in the trusts of *Blyth's* will. In these circumstances this Petition was presented, praying for the appointment of two persons as new trustees of *Blyth's* will in the place of *Godfrey* and *Lawson*; for

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the appointment of a person to convey the real estate for all the estate vested in *Lawson's* devisees; and for a vesting order as to the personal estate subject to the trusts of the will.

Mr. *Bardswell*, for the Petitioner.

Mr. *North*, for *Lawson's* devisees:—

It is submitted that this Petition ought to be in Chancery only. The cases appear to proceed on the principle, though none of them lay it down in express terms, that where there is jurisdiction independently of the fact of lunacy, that fact does not make the matter a lunacy matter: *Re Arrowsmith's Trusts* (1); *Herring* v. *Clark* (2). The case of *In re Owen* (3) is quite consistent with that principle, for it was a case where there was no jurisdiction apart from lunacy. Here there are no duly constituted trustees, and the Court of Chancery would have had authority under the *Trustee Act*, 1850, ss. 32, 34, to make the order asked if *Mason* had been of sound mind. The case is, therefore, similar to *Re Arrowsmith's Trusts*.

Mr. *Bardswell*, in reply:—

It is submitted that the order ought to be in Lunacy as well as in Chancery: *Re Stewart* (4); *Trustee Act*, 1850, s. 3.

SIR W. M. JAMES, L.J.:—

Looking at sect. 3, I think the order ought to be in Lunacy as well as in Chancery.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *T. W. Payne;* Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) 6 W. R. 642.
(2) Law Rep. 4 Ch. 167.
(3) Law Rep. 4 Ch. 782.
(4) 8 W. R. 297.

In re HANEY'S TRUSTS.

L. JJ.
1875
Feb. 22.

Practice—Trustee Relief Act—Service on Respondent out of the Jurisdiction.

The Court has jurisdiction to order service of a petition under the *Trustee Relief Act* (10 & 11 Vict. c. 96) on a party out of the jurisdiction.

IN this case a Petition was presented under the *Trustee Relief Act*, and was attached to the Court of Vice-Chancellor *Bacon*. One of the Respondents being in *Ireland*, an application was made to the Vice-Chancellor for leave to serve him there. His Honour gave leave, but on a subsequent occasion, feeling some difficulty on account of *In re Mewburn's Settled Estates* (before the Master of the Rolls, June 22, 1874), desired that the point might be mentioned to the Court of Appeal.

Mr. *T. Smith Osler*, for the Petitioner, referred to *Ex parte Crawford* (1); *Ex parte Bernard* (2); *Lorton* v. *Kingston* (3); *Lester* v. *Bond* (4); *Re Alcan* (5); *Re Hodson* (6); *Shurmer* v. *Hodge* (before Vice-Chancellor *Kindersley*, July 24, 1866); *Re Maugham* (7); *In re Bonelli's Electric Telegraph Company* (8); *In re Mewburn's Settled Estates*.

THEIR LORDSHIPS stated their opinion to be, that service of a petition under the *Trustee Relief Act* out of the jurisdiction could be directed.

Solicitor: Mr. *W. Eley*.

(1) 2 Ir. Ch. Rep. 573.
(2) 6 Ibid. 133.
(3) 2 Mac. & G. 139.
(4) 1 Dr. & Sm. 392.
(5) 1 D. J. & S. 398.
(6) 17 Jur. 826.
(7) 22 W. R. 748.
(8) Law Rep. 18 Eq. 655.

L. C. and L. JJ.
1875
Jan. 20, 21.

ESTCOURT *v.* ESTCOURT HOP ESSENCE COMPANY.

[1874 E. 67.]

Costs—Deception—Misrepresentation.

A bill was filed by the manufacturers of a substance used instead of hops for brewing beer to restrain the Defendants from making and selling a substance intended for the same purpose. As to some of the grounds for relief the Plaintiffs had failed, and as to others they were held to be too late in their application, and the bill was therefore dismissed; but:—

Held, that, as the substances made by both Plaintiffs and Defendants were intended to be used to deceive the public, no costs would be given to the Defendants.

Decree of *Malins*, V.C., reversed.

THOMAS ESTCOURT and *Nathaniel Bradley*, the Plaintiffs in this case, were manufacturers of a substance called *Estcourt's Hop Supplement*, intended to be used by brewers in part substitution for and in conjunction with hops in brewing beer. The Plaintiffs had employed the Defendant *Charles Estcourt* as their agent for the sale of the *Hop Supplement*, he entering into an agreement with them, dated the 17th of October, 1871, which contained a provision that he was not at any time, directly or indirectly, to sell or be connected with any other substance which could be used as a substitute for hops. The Plaintiffs alleged, further, that he at the same time pledged himself not to communicate the secret of the manufacture.

In July, 1873, *Charles Estcourt* ceased to be agent for the Plaintiffs, and was appointed public analyst for *Manchester*. The Plaintiffs afterwards discovered that *Charles Estcourt* was, in the name of *Estcourt & Co.*, manufacturing and advertising a substance called *Hop Essence*, which was, as thus alleged, identical with the *Hop Supplement*, and they therefore filed a bill to restrain him. The proceedings on the bill were abandoned, *Charles Estcourt* signing, on the 15th of August, 1873, an agreement to do no further harm to the business of the *Hop Supplement*, and to discontinue the manufacture and sale of the *Hop Essence*.

In January, 1874, the Plaintiffs discovered that a printed circular had been recently issued, offering for sale a preparation called

Estcourt & Co.'s Hop Essence, of which *James Taylor* was stated to be the proprietor; and the Plaintiffs believed *James Taylor* was in fact agent for *Charles Estcourt*, and that his name was used only for the purpose of evasion.

On the 18th of April, 1874, a company called the *Estcourt Hop Essence Company* was registered, the memorandum of association being signed by seven persons, two of whom were named *Estcourt*, and one was *James Taylor*, above mentioned. In May, 1874, this company issued a prospectus containing a description of the *Hop Essence* as to be used instead of hops, and stating that their clients could rely as formerly on the confidential nature of their business. *Charles Estcourt* was named in the prospectus as the consulting chemist to the company.

On the 12th of August the Plaintiffs filed the bill in this suit against the company and *Charles Estcourt*, stating as above mentioned, and charging that the company was formed for the purpose of enabling *Charles Estcourt*, under the name of the company, to continue the manufacture and sale of the *Hop Essence* in accordance with the secret process of the Plaintiffs; that the *Hop Essence* was identical with, or only colourably differed from, the *Hop Supplement;* and that the manufacture and sale of the *Hop Essence* was, so far as *Charles Estcourt* was concerned, a gross breach of faith towards the Plaintiffs, and a violation of his agreements. They charged, further, that the use of the name of the *Estcourt Hop Essence Company* for the sale of *Hop Essence* was calculated to mislead the public, and to induce them to purchase the *Hop Essence* under the belief that they were purchasing the *Hop Supplement;* and the bill prayed that the company might be restrained from continuing such use of the name of *Estcourt*, and from making use of the knowledge obtained by *Charles Estcourt*, and from manufacturing and selling the said *Hop Essence* or any other substance identical with or only colourably differing from the said *Hop Supplement*, and from using in any manner, and from communicating or disclosing to any other person, the secret of compounding the said *Hop Supplement*. The Plaintiffs, and also the company, published in the *Brewers' Guardian*, a newspaper circulated amongst brewers, advertisements in which each claimed to be original inventors.

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The other facts of the case, so far as they are material, appear in the judgment of the Lord Chancellor.

The Plaintiffs, on the 12th of November, 1874, moved before the Vice-Chancellor *Malins* for an injunction according to their prayer, when it was arranged that the cause should be heard on the evidence as it stood upon notice of motion for decree. The motion for decree was heard on the 3rd of December, and the Vice-Chancellor *Malins* then made a decree for a perpetual injunction.

The Defendants appealed.

Mr. *Glasse*, Q.C., and Mr. *Millar*, for the company.

Mr. *North*, for *Charles Estcourt*.

Mr. *Higgins*, Q.C., and Mr. *Hemming*, for the Plaintiffs.

Mr. *Millar*, in reply.

LORD CAIRNS, L.C.:—

Some of the argument in this case has been directed to the question whether allowance ought not to be made to the Plaintiffs for imperfections in their evidence, because the case now comes on upon motion for a decree into which the motion for an injunction was turned.

It appears to me that it ought to be understood that the rules of pleading and evidence are exactly the same on the hearing of a motion for decree as on the hearing of a cause which has gone on to replication in the regular way. It is of course always open to the Court, on the hearing of a motion for a decree, to order the cause to proceed to a hearing in the regular way. But it seems to me that even if the evidence in this case were imperfect the Plaintiffs would not be entitled to this indulgence, because everything was before them at the time when the motion for an injunction was turned into a motion for a decree, and it was for them to consider whether they would or would not adopt that course.

Having made these observations, I wish to say that, as far as I can perceive, my judgment does not depend upon any technical defects in the evidence, and the conclusion to which I have come would have been the same if the evidence had been before us in another form.

There are in the bill three different heads of relief which must be kept quite distinct. The first is in respect of infringement of a trade-mark, or a name in connection therewith; the second is in respect of an abuse of confidence as regards the communication of a trade secret; the third is in respect of the alleged violation of a contract made by the Defendant *Charles Estcourt* in August, 1873, on the occasion of the proceedings in the former suit against him being stayed.

With regard to the second head, the betrayal of a secret, it is alleged that *Charles Estcourt*, when he was in 1871 appointed the Plaintiffs' agent, in addition to a written agreement with them, entered into a verbal agreement that if he became acquainted with their trade secret in any way he would not disclose it. He denies the existence of any such verbal agreement; and there being oath against oath, the Plaintiffs cannot be said to have proved their case. The written agreement is silent on this point, and I cannot find that there was any contract as to secrecy. In addition to that, it appears to be proved, even by the evidence on which the Plaintiffs relied, that nothing came to the knowledge of *Charles Estcourt* by way of confidential communication from the Plaintiffs. He states that he, being on the point of terminating his engagement, analysed a packet of the Plaintiffs' compound, which he procured from a brewer, and in this way obtained such knowledge as he had of its composition. There is no reason for doubting this statement; and in my opinion *Charles Estcourt* was not debarred from communicating to any one else the knowledge thus acquired. Then, as to the company, they said that they acquired their knowledge from *Frederick Estcourt*, a brother of *Charles*, and as there would have been no impropriety in their acquiring the knowledge from *Charles* himself, still less could there be any in their acquiring it from *Frederick*.

I now come to the first head—the infringement of trade-mark. There is no doubt that the Plaintiffs had long and successfully carried on their business, and that the name *Estcourt* was well known to brewers. The Plaintiffs knew in January, 1874, that a circular was issued by *James Taylor* headed "*Estcourt & Co.'s Hop Essence.*" This was the more pointed, because the circular did not pretend to emanate from one of the *Estcourts*, but

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from *James Taylor*, who was described as sole proprietor; and under these circumstances, had the Plaintiffs applied in proper time, I am not prepared to say that they would not have been entitled to an injunction; on the contrary, as at present advised, I think that they would have been. But they made no such application. They say that they could trace no sales, or only one or two, and that they thought their secret safe. But they did know that a circular was issued; and yet through February, March, and April they took no steps. Then in April the company formed by the *Estcourts* and their relatives was registered, taking the name which had been before the trade with no objection for nearly four months; and this fact came immediately to the Plaintiffs' knowledge. They still made no application, but, on the contrary, were content to protect themselves by means of advertisements in publications like the *Brewers' Guardian*. They might well do this, for the article in which they dealt was only for sale to a limited class, viz. brewers, not to the public generally; and their advertisement appeared in the *Brewers' Guardian* side by side with that of the company; and it was for brewers who would read them to study them for themselves, and so decide which preparation they would employ. June and July were then allowed to pass, and in August the Plaintiffs came and asked for the interposition of this Court; and when they did apply, they were unable to shew that in all that time a single brewer had been misled by the acts of the Defendants. After such delay in a case like this, it could not be said that it would be according to the practice of this Court to interfere.

I am therefore of opinion that this case has failed on the head of infringement of trade-mark. I put aside altogether any question of similarity of labels, because the Vice-Chancellor has decided that upon that point the case must fail.

There remains then the third head—whether there is any ground of relief against *Charles Estcourt* because of any hold which the Plaintiffs had upon him by the agreement of 1873. But he is not selling or manufacturing the *Hop Essence;* he is only employed at a salary as the consulting analyst of the company; and I cannot persuade myself that the agreement precluded him from acting in that capacity. Taking the agreement in its strictest

sense, it could not be held to prevent him following his calling as a chemist.

In my opinion, all the three grounds of relief have failed, and the bill ought to have been dismissed.

Then the question arises whether the bill ought to have been dismissed with costs. I think that it ought not. The case is very peculiar. The Plaintiffs ask us, in fact, to try the issue whether the two compounds are the same, but do not reveal what is the composition of the substance which they sell. The Defendants also do not offer to discover what is the composition of the substance which they profess to make. They are both entitled to practise this concealment, but they cannot ask the Court to decide an issue which cannot be satisfactorily dealt with unless the composition of the substances is known.

This, however, is not all. It is impossible not to see that these substances are introduced, recommended, and sold for the purpose of enabling brewers to supply to the public a liquid which they may represent to the public as being made with pure hops when it is not in fact so made. It is also clear that this was to be done secretly, because if the public knew what was done, they would not buy the beer so manufactured. I do not express any opinion whether the use of these compounds would come within the description of adulteration, but clearly the object was to induce the public to buy one thing when they thought they were buying another. It is not the province of this Court to protect speculations of this kind; nor ought a Defendant who is engaged in a business of the same kind to obtain costs even when successful. These remarks apply to *Charles Estcourt* as well as to the company.

Moreover, many of the statements of the Defendants in their advertisements, where they put themselves forward as the original inventors, and speak of themselves as an old-established firm, caution the public against imitators and their inventions, are clearly intended to give the notion that the Defendants are the original inventors. These are, to say the least of it, statements which disentitle the Defendants to any favour from this Court, and on this ground, as well as upon the higher ground which I have just mentioned, I think that the bill ought to have been dismissed without costs. There will, of course, be no costs of the appeal.

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SIR G. MELLISH, L.J.:—

I think that the evidence that *Charles Estcourt* had communicated the secret he had acquired has failed to establish the fact. I have some little doubt whether he must not be considered to admit by his second agreement that he was not entitled to communicate it with the view of producing and selling the *Hop Supplement*, and had it been clearly proved that he had disclosed the secret to any one else, I should have had some doubt whether it was not a breach of his agreement. The case against him is a case of suspicion which justified the Plaintiffs in suspecting that he was the person who had communicated the secret. The bill was filed, and they got his answer that he had not communicated it, and then they got *Frederick Estcourt's* answer in the same terms. The burden of proof lay upon the Plaintiffs to shew that this was not so, and they have failed. On all the other points I agree with the Lord Chancellor.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Messrs. *Hopwood & Sons;* Messrs. *Pritchard, Englefield, & Co.*

AYNSLEY *v.* GLOVER.

L. JJ.
1875
Feb. 17, 22.

[1874 A. 81.]

Ancient Lights—Enjoyment from Time immemorial—Enlargement of Windows —Injunction or Damages—Prescription Act (2 & 3 *Will.* 4, *c.* 71).

In a suit to restrain the Defendant from building so as to obstruct the Plaintiff's ancient lights, it was proved that for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of the Plaintiff and the Defendant, but there was no evidence of there ever having been any unity of title; and it was proved that before the unity of possession commenced the access of light to the windows had been enjoyed as far back as living memory went:—

Held (affirming the decision of the Master of the Rolls), that the Plaintiff had established his title to the access of light, by proof of enjoyment from time immemorial, independently of the statute 2 & 3 Will. 4, c. 71; for that the statute does not take away any of the modes of claiming easements which existed before its passing:

Held, also, that the fact that some of the windows had been considerably enlarged did not take away the right to an injunction; and that the Plaintiff ought not to be put upon the terms of restoring the windows to their former size.

THIS was an appeal by the Defendant from a decree of the Master of the Rolls granting a perpetual injunction against interference with ancient lights in a building forming part of an inn. The case is reported on an application for an interlocutory injunction (1).

The bill was filed to prevent building on a vacant piece of the ground so as to obstruct the light coming to any of the eight windows, which the Plaintiff alleged to be ancient lights. The Plaintiff obtained a decree as to four of them, with costs of suit.

As to these four windows, it was deposed to by an old man, above eighty years old, that he remembered them all his life, but that two of them had been considerably enlarged about the year 1846. From the year 1849, or earlier, till shortly before the commencement of the suit, the property on which the windows were, and the vacant piece of ground, were in the occupation of the same person; but there had not been any unity of title.

(1) Law Rep. 18 Eq. 544.

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Mr. *Roxburgh*, Q.C., and Mr. *Cracknall*, for the Defendant, in support of the appeal:—

The Plaintiff's title must depend on the Act 2 & 3 Will. 4, c. 71, s. 3, and is defeated by the unity of possession: *Onley* v. *Gardiner* (1); *Battishill* v. *Reed* (2). There is no authority shewing that a right to light can be claimed otherwise than under the statute.

[The LORD JUSTICE MELLISH:—It is every-day practice to plead, 1, enjoyment for twenty years before action; 2, enjoyment for forty years before action; 3, enjoyment from time immemorial; 4, a lost grant; and it has always been understood that a right may be supported on the third ground, although it may be incapable of being supported under the first or second. There are no negative words in the statute to take away rights existing independently of it.]

At all events, there is no right in respect of the new part of the windows, and the case should be dealt with as in *Staight* v. *Burn* (3).

[The LORD JUSTICE JAMES:—I do not believe that that case has ever been understood as intended to lay down the rule that a Plaintiff must restore his windows to their former size in order to get an injunction. I understand it only to have meant that a Plaintiff must not, pending the proceedings, obstruct his own light in such a way as to make it impossible at the hearing to try the question of fact properly.]

To hold that the Plaintiff can only get an injunction by restoring the windows to their old state is reasonable, as otherwise the owner of them would acquire an increased easement.

[The LORD JUSTICE JAMES:—The servitude would not be increased.]

The case is not one for an injunction, but for damages. It was the object of *Lord Cairns' Act* to give the Court a discretion as to which it would grant: *Jackson* v. *Duke of Newcastle* (4). At all

(1) 4 M. & W. 496.
(2) 18 C. B. 696.
(3) Law Rep. 5 Ch. 163.
(4) 3 D. J. & S. 275.

events the Plaintiff should not have the costs of the suit, for he has only succeeded in part: *Weatherley* v. *Ross* (1).

Mr. *Southgate,* Q.C., and Mr. *Keary,* for the Plaintiff, were not called upon.

SIR G. MELLISH, L.J.:—

This is an appeal from a decree of the Master of the Rolls in a suit for the interruption of ancient lights.

The suit appears to have been brought originally by a bill for the interruption of eight ancient lights; but the Plaintiff has only succeeded in getting a decree as to four of them.

The first question is, whether the Plaintiff has made out his right to the light in respect of those four windows. The objection that is made to them is, that although they have been erected more than twenty years, yet there has been a unity of possession, at any rate, from the year 1849, if not before, up to within a very short time before the filing of the bill.

In my opinion, it is unnecessary to consider whether the Plaintiff could have made out his right under the statute 2 & 3 Will. 4, c. 71, because I am of opinion that, under the circumstances of the case, the Plaintiff has clearly made out a right from time immemorial.

The statute 2 & 3 Will. 4, c. 71, has not, as I apprehend, taken away any of the modes of claiming easements which existed before that statute. Indeed, as the statute requires the twenty years or forty years (as the case may be), the enjoyment during which confers a right, to be the twenty years or forty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements which would be altogether destroyed if a Plaintiff was not entitled to resort to the proof which he could have resorted to before the Act passed.

Now, in this case there is an old man above eighty years old, who says that he recollects these windows all his life; that before the cottages, in which the windows in question are, became part of the inn to which they now belong, they were occupied as separate

(1) 1 H. & M. 349.

L. JJ. 1875 AYNSLEY v. GLOVER.

cottages; that he was born in one of them; and that the windows were there as far back as he knew the cottages, subject to this, that two of the windows had been considerably enlarged in the year 1846. It also appears that the cottages were in existence in the year 1808, for in a deed dated in that year they are conveyed as being then in existence. I quite agree with the Master of the Rolls that it must, of course, be inferred that the windows were in existence then. Beyond that we know nothing about them, and therefore the proof is that the cottages with the lights in them have existed as far back as living memory goes, and we have no evidence as to when they were built; and although there is clear evidence of unity of possession in the year 1849, and there is a question whether that unity of possession may not have commenced between the years 1830 and 1840, still it is clear that there were a great number of years before during which there was no unity of possession, and there is no evidence that there ever was any unity of title at all. Under those circumstances there is, I apprehend, clear evidence of a right to the light from time immemorial, which is not in any way taken away by the statute. I am, therefore, of opinion that the Plaintiff has proved his right to these four lights.

Then the next question is, whether he is bound to reduce the two lights out of the four which were enlarged by the roof being raised and the windows being raised with it—whether he is obliged to bring back those old windows to their old size as a condition of obtaining the injunction. I am of opinion that he is not. That appears to me clearly to follow from the case of *Tapling* v. *Jones* (1), which I think governs Courts of Equity as well as Courts of Law. The principle of that case is perfectly plain, that opening a new window or the enlargement of an old window in the wall of your house is no injury or wrong at all to your neighbour. It is one of the natural rights of property which any man is entitled to exercise, and he cannot, by exercising that right, lose any other right which he may have acquired. Therefore, having got a right to the entry of light into a window of a certain size, he does not, by making that window larger, lose his right to the entry of the light to the old part of it. I do not understand upon what

(1) 11 H. L. C. 290.

principle this Court can say, "We will not give you relief in equity against being wrongfully deprived of the light to which you are entitled unless you do something which you are not bound to do, viz., block up windows which you are perfectly entitled to open if you please." To impose such a condition appears to me to be inconsistent with the principle of *Tapling* v. *Jones* (1), and I do not think that there is any authority in favour of it. The only case cited was *Staight* v. *Burn* (2), which appears, I think, to have depended upon its own circumstances; at any rate, it is a case on an interlocutory injunction, which cannot bind this Court in determining what is the final decree to be made. I am of opinion, therefore, that the Plaintiff cannot be put under terms to reduce his windows to their old size.

The next point that was raised is that the Court ought not to grant an injunction, but ought merely to give damages. Now I am of opinion that this is a case for an injunction. I think that the Plaintiff has proved his right to the ancient windows. Here are rooms in an inn which is used and enjoyed for the purposes of an inn, and the Defendant proposes to erect a building within five feet of them. Of course that would altogether obstruct the light coming to them. He proposes to build on a waste piece of ground, and the Plaintiff has filed his bill before the building is even commenced. It is fortunate in this case that the building proposed to be erected is so near his house that the Plaintiff is not in the difficulty in which Plaintiffs often are, viz., as to its being doubtful whether the proposed building would obstruct the lights or not. Here it is so near that it is absolutely certain that it would obstruct the lights, and therefore, very properly, the Plaintiff filed his bill immediately. I cannot understand why the Defendant is to be allowed to build upon a mere bit of waste land so as to block up the rooms of this public-house which are necessary for its enjoyment. It appears to me that this is properly a case for the Court to interfere by injunction.

The only other point which was raised was about costs. I do not see any reason to object to the decision of the Master of the Rolls about the costs, because practically the case as to the whole of the eight windows depended upon the same evidence, and in

(1) 11 H. L. C. 290. (2) Law Rep. 5 Ch. 163.

L. JJ. 1875 ~~ ...YNSLEY v. GLOVER.

my opinion the costs would not have been materially lessened if the bill had been filed respecting these four windows only. I do not think that there is any reason to suppose that the Defendant would have yielded respecting the four windows, because he has fought it all out respecting the four windows as well as the others. If he had made an offer to submit as to the four windows the case would have been different.

I am of opinion that the decision of the Master of the Rolls is right, and that this appeal should be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Wedlake & Letts;* Mr. *F. C. Greenfield.*

L. JJ. 1875 ~~ *Feb.* 22.

RICHARDS *v.* GODDARD.

[1871 R. 99.]

Cross-examination—Costs of Witness—Gen. Ord. 5th Feb., 1861, *r.* 19.

The Plaintiff produced a witness before the examiner, and demanded the expenses of his production. The Defendant's solicitor objected to the amount, but undertook to pay what should be found due upon taxation. The witness was then sworn, and the cross-examination proceeded. The Plaintiff then applied for an order for repayment by the Defendant of the amount paid by the Plaintiff to the witness for his expenses, or for taxation, and payment of the amount found due. Vice-Chancellor *Hall* considered that the question had better be left till the hearing of the cause, and declined to make any order:—

Held, on appeal, that the matter was not one for judicial discretion, but that the Plaintiff was entitled, *ex debito justitiæ*, to an immediate order for taxation and payment.

THIS was an appeal from a decision of Vice-Chancellor *Hall.*

The suit was for an injunction to restrain the building of a wall. The Plaintiff gave notice of motion for decree, and among his affidavits was one sworn in April, 1872, by *F. J. Field.* The Defendant gave notice to cross-examine *Field*, who in the meantime had gone to reside in a distant part of *America.* A contest

arose as to who should, in the first instance, pay the expenses of bringing him over, and Vice-Chancellor *Hall* decided (1) that the Plaintiff must bring him over, and tender him for cross-examination before he could demand the expenses from the Defendant.

The Plaintiff accordingly brought the witness over, and a special examiner was appointed to take the cross-examination, which was had on the 22nd of January, 1875. Before the witness was sworn, the Plaintiff's counsel demanded payment of £150, which the Plaintiff had paid *Field* for his expenses. The Defendant's solicitor declined to pay anything before taxation, but stated that the Defendant was willing to pay any sum which on taxation he should be found liable to pay. The Plaintiff's counsel thereupon said that the cross-examination might proceed, but that he reserved his right to object to any use being made of the depositions till the expenses had been paid. The cross-examination accordingly took place, and the Plaintiff afterwards moved before Vice-Chancellor *Hall* that the Defendant might be ordered to pay him £177 6*s*., the amount paid by the Plaintiff to *Field*, or that the expenses of the production of *Field* might be taxed, and that the Defendant might be ordered to pay the amount within one week after the certificate.

The Vice-Chancellor having declined to make any order on this application, the Plaintiff appealed.

Mr. *Morgan*, Q.C. (Mr. *C. Browne* with him), for the Appellants, having stated the facts, and referred to Gen. Ord. 5th Feb., 1861, rule 19, was stopped by the Court.

Mr. *Dickinson*, Q.C., and Mr. *Begg*, *contrà*:—

The Vice-Chancellor considered that the hearing was the proper time for making an order as to these costs; and if the Plaintiff had proceeded with ordinary diligence the cause might have been heard before this. The Court will not interfere with the discretion of the Vice-Chancellor in such a case. The Plaintiff must be taken to have accepted the undertaking of the solicitor in lieu of his right to be paid at the time.

(1) Law Rep. 17 Eq. 238.

L. JJ. 1875 RICHARDS v. GODDARD.

SIR W. M. JAMES, L.J. :—

In my opinion this is not a matter of discretion; but the Plaintiff is asking for what, according to the words of the order, he is entitled to *ex debito justitiæ*. [His Lordship read Gen. Ord. 5th Feb., 1861, rule 19.] To say that the Plaintiff is only to be paid at the hearing is against the words and the spirit of this rule. It may be that the Plaintiff had a right to say, "You shall pay before I let the witness be cross-examined;" but that is only a question as to the way in which the rule is to be enforced. The order says he may demand the expenses. He did at the time demand the sum which he had actually paid to the witness. The Defendant's solicitor objected to the amount, and refused to pay it, but gave an undertaking to pay what should be found due on taxation, which must be taken to mean as soon as it could reasonably be ascertained by taxation; and I cannot think that the liability to pay at once is affected by that undertaking having been given. The Plaintiff is entitled to an order for immediate taxation, and for payment of what shall be found due.

SIR G. MELLISH, L.J. :—

I am of the same opinion. It is admitted that the expenses were demanded before the witness was sworn; and if no undertaking had been given, it would have been strange to say that the right to payment had been lost by the Plaintiff's allowing the cross-examination to proceed. It would be very inconvenient to hold that in such a case the Plaintiff must get the cross-examination postponed until the costs are taxed or else lose his right.

Solicitors: Mr. *Roberson;* Mr. *Thomas Wells.*

DE BAY *v.* GRIFFIN.

[1870 D. 133.]

L. JJ.
1875
March 22.

Costs—Solicitor's Lien on Fund—23 & 24 Vict c. 127, *s.* 28—*Taxation.*

B. acted as attorney for *G.* in an action which resulted in *G.'s* recovering a large sum. A bill was filed by persons claiming through *G.* to establish their equitable title to that sum, and in February, 1871, the Defendant in the action paid the sum recovered into Court to the credit of the cause in which *B.* was a Defendant in respect of his lien. In March, 1871, *B.* delivered his bill of costs in the action to *G.* In December, 1873, the suit was compromised and the fund distributed, except a sum kept in Court to answer *B.'s* claims:—

Held (reversing the decision of *Malins*, V.C.), that *B.* was not entitled to have his bill of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that *G.'s* right to tax it would have been lost before the fund was paid into Court.

THIS was a motion by the Defendants *Fothergill, Lewis,* and *Hankey,* by way of appeal from an order of Vice-Chancellor *Malins* on an adjourned summons.

In 1866 the Defendant *Griffin* entered into a contract with the *Tharsis Sulphur and Copper Company, Limited,* for the construction of a railway in *Spain.*

After the completion of the railway disputes arose between *Griffin* and the company as to the amount payable to him, and he commenced an action at law against the company for the balance he claimed. The matter was referred to arbitration. *James Brendon Batten,* the Respondent in the present appeal, acted as attorney for *Griffin* in the action and arbitration. In November, 1870, the arbitrator awarded to *Griffin* £26,457. In December, 1870, the Plaintiffs in this cause filed their bill against *Griffin,* the company, and *Fothergill, Lewis,* and *Hankey,* who claimed an interest as incumbrancers from *Griffin* under an instrument dated the 28th of April, 1869, and some other incumbrancers, to establish the title of the Plaintiffs to the £26,457 under arrangements entered into between them and *Griffin* at the time of his entering into the contract to make the railway. *Batten* was made a Defendant as claiming a lien on the fund for his costs, and on

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the 8th of February, 1871, an order was made for the company to pay £3000 into Court to a special account—£971, the expenses of the award, to the person who had paid them, and £22,709 into Court to the general credit of the cause. The payments into Court were made on the same day.

On the 11th of March, 1871, *Batten* delivered to *Griffin* his bill of costs in the action and arbitration, amounting to £3041 7*s.* 10*d.*, against which he set off £1715 19*s.* taxed costs received from the company, and £500 received from *Griffin*, leaving a balance of £825 8*s.* 10*d.* In May, 1871, he put in his answer in the suit, claiming a lien on the fund in Court for that sum under 23 & 24 Vict. c. 127, s. 28, and on the 21st of January, 1873, he obtained a charging order from the Court of Exchequer under that Act.

In the latter part of 1873 an agreement was come to for compromising the suit. Such compromise was carried into effect by an order of the 4th of December, 1873, which contained a direction that a sum of £1500 consols should be carried over to a separate account, "The account of Defendants *Fothergill*, *Lewis*, and *Hankey*, subject to Defendant *Batten's* claim and his costs."

In April, 1874, *Batten* applied by summons to have his costs of the suit taxed, and the amount of such taxed costs and the £825 8*s.* 10*d.* raised and paid out of the £1500 consols. This summons was adjourned into Court, and Vice-Chancellor *Malins*, being of opinion (1) that the right to have the costs of the action and arbitration taxed had been lost, made an order as asked.

(1) 1871. Jan. 23.

SIR R. MALINS, V.C. :—

It is perfectly clear that the money paid into Court on the 8th of February, 1871, was paid in subject to the lien of Mr. *Batten* as the attorney of Mr. *Griffin*. *Griffin* had given a security to Messrs. *Fothergill*, *Lewis*, and *Hankey*, upon what he should recover in the litigation with the *Tharsis Company*, and as between them and Mr. *Griffin* they were entitled to the whole of what Mr. *Griffin* was entitled to recover. They state in their affidavit that on the 3rd of May, 1869, they gave a notice to the *Tharsis Company* of their claim against Mr. *Griffin*, but they did not give notice to Mr. *Batten*, who was conducting the litigation, that they claimed to deprive him of one iota of right which he might have against Mr. *Griffin*; indeed, they do not allege that they gave any notice to Mr. *Batten*. The money, then, on the 8th of February, 1871, was paid into Court, subject to the lien of Mr. *Batten*. Now, as between Mr. *Batten* and all parties concerned, what was his lien? Clearly his lien was for his costs to be

Mr. *Marten*, Q.C., and Mr. *W. F. Robinson*, for the Appellant:—

The Respondent has obtained a charging order, and now wishes to go behind it and escape taxation. There is a broad distinction

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taxed as between solicitor and client. Mr. *Batten* therefore, having this right on the fund brought into Court, delivered his bill of costs on the 11th of March. What was the right of Mr. *Griffin* on the signed bill of costs? His right was to have that bill of costs taxed; and he might immediately, or at any time within a year, as a matter of course, have referred it for taxation. Mr. *Griffin*, who was the person at that time to pay the bill—who was the only client—took no steps to tax, but from the 11th of March, 1871, no objection whatever was raised to this bill. Mr. *Batten* delivered the bill, Mr. *Griffin* received it, and has had it in his possession for three years without raising any objection; and if Mr. *Griffin* were the only person before me now, upon the ground of acquiescence, the bill having been delivered for three years, it cannot be taxed as of course, but only upon some special circumstances shewn. I think that the Court is and ought to be slow in taxing a solicitor's bill where the client has had it in his possession without objecting to it for three years. If Mr. *Griffin* was the only person interested, I should unhesitatingly say that he has no right now to have this bill taxed, unless he shews very special circumstances for doing so. But it has been said this morning, and an affidavit of the managing common law clerk of Messrs. *Thomas & Hollams* has been read in support of the allegation, that the bill contains improper and enormous charges. Certainly on reading that affidavit the charges there specified seem large, but I find that many of them were for things done by the express order of Mr. *Griffin* himself, and of such items, however lavish the expense might be, Mr. *Griffin* (whom I must treat as an intelligent man, and intimately conversant with the business he was conducting, which was that of a railway contractor claiming against the company for whom he made the railway), if he chose to have that expense incurred, could not complain; and after all I have heard, I cannot accede to the notion that Messrs. *Fothergill*, *Lewis*, and *Hankey* have any greater right against Mr. *Batten* than Mr. *Griffin* himself had. I am therefore of opinion that if Mr. *Griffin* were now the applicant to have the bill taxed, there are no special circumstances sufficient to induce me to deviate from the ordinary course, which is to treat a solicitor's bill delivered more than a year as conclusive as to the amount, and to prevent the client having it taxed. I acted upon the same principle in the recent case of *Brooks* v. *Sidebottom*, and held that after the client has had the bill in his possession, and has had every opportunity of objecting to the amount, it is not reasonable that he should be permitted to tax it after such a lapse of time as would justify the solicitor in believing that all questions between himself and his client as to amount were settled. I am therefore of opinion, upon these grounds, that upon an application by Mr. *Griffin* himself I should consider him bound by the amount stated in the bill signed and delivered.

Now in this case it would be a grievous hardship upon Mr. *Batten* if Messrs. *Fothergill*, *Lewis*, and *Hankey* were held to have a better right than Mr. *Griffin*

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between a common law lien and a lien under the statute. The one is only on the interest of the client, the other is on the fund preserved, irrespective of the interest of the client: *Verity* v. himself. Mr. *Griffin* undoubtedly did tell Mr. *Batten* that Messrs. *Fothergill*, *Lewis*, and *Hankey* had claims against him, and would be entitled to some of the money or all the money he recovered in the action. But what does he recover? Only that portion of the damage to which he is entitled after paying his attorney's bill; and therefore if Messrs. *Fothergill*, *Lewis*, and *Hankey* intended to prevent the unnecessary incurring of costs in this case, knowing the nature of the claim, they ought, instead of leaving Mr. *Griffin* to conduct it in his own way, and therefore in fact permitting him to act as their agent to conduct the litigation, and to say what copies should be made, what counsel should be engaged, and how the litigation should be conducted, to have intervened and said, "We are to have the fruits of this litigation; we cannot have it conducted in an unnecessarily expensive manner. Mr. *Griffin* has no interest in it, and therefore we must have it conducted economically, so that whatever is recovered may go to pay us." As they permitted him to act without control, my opinion is that they are bound by his conduct, and can have no greater right than *Griffin* himself would have had.

Mr. *Pearson* has referred to the Act 6 & 7 Vict. c. 73, s. 38, which provides that where any person not the party chargeable with the bill shall be liable to pay or shall have paid such bill, either to the attorney or solicitor or to the party chargeable, it shall be lawful for such person, his executors, administrators, or assigns, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and then contains this proviso: "Provided always, that in case such application is made when under the provisions herein contained a reference is not authorized to be made except under special circumstances, it shall be lawful for the Court or Judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application." If, therefore, Messrs. *Fothergill*, *Lewis*, and *Hankey* could have shewn that any special considerations existed in their favour which did not exist in favour of Mr. *Griffin*, then I should have had regard to them; but in my opinion there is not a tittle of evidence to shew that they are entitled to any greater favour than Mr. *Griffin* would have been. They have bound themselves as to the mode of conducting the litigation entirely by what Mr. *Griffin* did. This is the conclusion I should have arrived at if there had been no charging order.

Then it is urged that Mr. *Batten* has obtained a charging order. Now, first, does a solicitor by obtaining a charging order abandon the lien which he had before it was made? There has been cited to me what Lord *Eldon* said in *Balch* v. *Symes* (T. & R. 87), that by taking security the solicitor abandons his lien. No doubt Lord *Eldon* said what is perfectly correct, as mostly what he said was correct, but what does he mean by taking a security? He does not mean if a man has

Wylde (1); *Bailey* v. *Birchall* (2). The lien can only be such as is given by the statute, *i.e.*, for taxed costs.

Mr. *J. Pearson*, Q.C., and Mr. *Millar*, for *Batten*:—

There cannot be any taxation of a bill after a year, except under special circumstances, and no special circumstances of any description are alleged here. The incumbrancers stand in no better position than *Griffin* himself.

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a lien upon a fund, and he takes a written order also that he shall have that lien, that he abandons the lien. It cannot be so, because he has the same thing as he had before. What, then, is the effect of taking this charging order? It was clearly unnecessary to obtain it, and I do not think it was a wise thing to obtain it, but I cannot say that the charging order prejudices any right which Mr. *Batten* previously had. The charging order therefore must, in my opinion, as Mr. *Pearson* in his reply contended, be regarded only as an additional security, if additional security were wanted, which for the reasons I have stated it was not.

But then it has been argued that I must treat this case as if it depended upon the charging order only. As that point has been so strenuously argued, and has occupied so much of the time of the Court, I think it right to give my opinion upon that subject. If it rested merely upon that, I am bound to say that I should be obliged to come to a conclusion in favour of Messrs. *Fothergill*, *Lewis*, and *Hankey*, because I think by the terms of the 28th section the charging order can only be for taxed costs; and if, therefore, the right of the solicitor depended solely upon the charging order, I must take the right as it is conferred, that is, as a right to have taxed costs only. But if the solicitor has a lien upon the fund, as in the present case, which gives him abundant security without a charging order, he does not want to have this, which gives him taxed costs only, because he has that already which gives him the amount of the costs which the parties have taxed for themselves. A man is not obliged to tax a bill. Taxing a bill means ascertaining through the Taxing Master what is justly due upon it. The client may be his own taxing master, and say, "I think your bill is reasonable. You have delivered a bill for £500 for a litigation of a troublesome character. I admit it is a proper bill, and I quite admit that that is the amount I should pay." That is taxing it for himself. But "taxed costs" means taxed by the Taxing Master; therefore if Mr. *Batten's* right depended solely upon the charging order, I should have come to the conclusion that, inasmuch as it would in that case have been a new right given to him by the Act of Parliament, he could only have taken that which the Act gives him, namely, the amount of his taxed costs. But for the reasons I have stated I am of opinion that his right does not depend upon the charging order, but upon his general lien upon the fund which has been paid into Court.

(1) 4 Drew. 427.
(2) 2 H. & M. 371.

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SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor must be discharged. The case has nothing to do with the *Solicitors Act*, (6 & 7 Vict. c. 73), it is the case of an application to deal with a fund in Court, and the Court must ascertain what the parties are entitled to. At the time when the fund was brought into Court no bill had been delivered; there was therefore no claim for any ascertained amount of costs. The attorney said, "I have a claim on the fund for my costs," *i.e.*, for taxed costs, and that being his right that right was preserved. His right at that time was to taxed costs, and that is the right which the Court has to give him; the *quantum* is to be ascertained in the ordinary way. The case is similar to other cases of paying costs out of a fund. Nothing which was done by the legal holder of the fund after the lien was created could alter the rights of the real owners. The order of the Vice-Chancellor must be discharged, and an order for taxation made, but not under the *Solicitors Act*. The costs will be taxed as between solicitor and client, and the costs of the taxation will not depend on the result, but the solicitor will have them in any event.

SIR G. MELLISH, L.J.:—

If the bill had been delivered, and a twelvemonth had elapsed before the fund was paid into Court, the case might have stood otherwise; but here there was no right to costs free from taxation when the fund was paid in, and the right then existing cannot be altered.

Solicitors: Mr. *J. B. Batten;* Messrs. *Hollams, Son, & Coward.*

FISHER & COMPANY *v.* APOLLINARIS COMPANY.

[1875 F. 13.]

L. JJ.
1875
March 23.

Repeated Publication—Libel—Compromise of Criminal Proceedings—Duress.

The prosecutors in a trade-mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months:—

Held, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter.

Where an offence is of such a nature that the offender may be proceeded against either civilly or criminally, there is nothing illegal or improper in a compromise of the criminal proceedings taken against him.

Order of *Malins*, V.C., reversed.

THE bill in this case was filed by a company called *Fisher & Company, Limited*, and by *Eugene Fisher*, as Plaintiffs, against a company called the *Apollinaris Company, Limited*, and stated that *Fisher* had for some time carried on the business of mineral water manufacturer. That a company called *Fisher & Company, Limited*, was duly registered for the purpose of acquiring and carrying on the business aforesaid; and by an agreement, dated the 9th of October, 1874, and made between *Fisher* of the one part, and *E. J. Drew*, on behalf of *Fisher & Co.*, of the other part, *Fisher* agreed to sell to the company, when incorporated, his stock and goodwill in the business. That in October, 1874, the *Apollinaris Company* instituted a prosecution against *Fisher* for having unlawfully inclosed mineral water in certain bottles having thereon the trade-mark of the *Apollinaris Company*. That the police magistrate committed *Fisher* for trial, he being allowed to enter into his own recognizances to appear. That at the trial no evidence was offered against *Fisher*, and a verdict of not guilty was returned; and in pursuance of an agreement in that behalf, but under duress of the said criminal proceedings, *Fisher* signed and gave to the Defendants a letter in writing as follows:—

"Apology.—To the *Apollinaris Company, Limited.*

"Gentlemen,—You having instituted a prosecution for mis-

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demeanour against me for having sold as *Apollinaris* water, water which was artificially manufactured in this country in imitation of that which you import from the *Apollinaris Brunnen*, *Neuenahr*, *Ahrweiler*, and of which you have the exclusive agency, and having been committed to take my trial for that offence, I hereby beg to assure you that I sold the water in question without any knowledge that the same had been improperly manufactured. I, however, desire to express to you my deep sorrow that I should under such circumstances have been induced to sell or dispose of such aërated water, and I hereby offer the fullest apology to you in my power, and trust that you will not further continue proceedings against me.

"I authorize you to make such use of this apology as you may think necessary.

"Dated this 14th day of December, 1874.

"*Eugene Fisher.*"

That the *Apollinaris Company*, on or about the 16th of December, commenced, and had ever since continued, to publish or insert in the *London* daily and other papers the above-stated written apology. That the effect of the extensive and continuous publication of this advertisement had been most prejudicial both to *Fisher* and to *Fisher & Co.*, by deterring the public from taking shares in that company, and thus preventing the company from being in a position to carry out their agreement with *Fisher*, and also by injuring the trade and business which *Fisher & Co.* had agreed to purchase from *Fisher;* and that such continued advertisement would have the effect of destroying the business of *Fisher*, which the company had been formed to purchase. That much correspondence had passed between the solicitors on both sides. And the bill set out the correspondence, beginning with a complaint by *Fisher's* solicitors on the 19th of January, 1875, and containing an account given by them of the circumstances under which *Fisher* had bought the mineral water and bottles in question. And the bill charged that the advertisement was inserted with the fraudulent intent to destroy the business which *Fisher & Co.* had agreed to purchase; that the agreement, having been entered into under duress, was null and void, and that the authority given was revokable, and was revoked by *Fisher*,

and that in the advertisement the nature of the charge against *Fisher* was incorrectly set forth. And the bill prayed that the Defendants might be restrained from publishing the advertisement, and might pay damages to *Fisher & Co.*, and also to *Fisher*. The bill was filed on the 5th of February, 1875.

To this bill the *Apollinaris Company* demurred generally.

The Vice-Chancellor *Malins* overruled the demurrer (1).

The Defendants appealed.

(1) 1875. Feb. 25. WN(1875)45

SIR R. MALINS, V.C.:—

[His Honour read the allegations in the bill, and the correspondence, and observed that no doubt the intention was that the apology should be advertised, but it must have been implied from the nature of the transaction that a reasonable use should be made of such a document, and that it was not to be made a means of persecuting *Fisher* and holding him up to contempt every day of his life; and that, according to the statements made in the letters of *Fisher's* solicitors, his offence was very slight. His Honour then continued:—]

There is an allegation that the continuing to publish these advertisements will be ruinous to the Plaintiffs' business; and that is admitted to be true. Does justice require that these advertisements should be allowed to continue as long as this company exists and *Fisher* lives? Are they to be at liberty to parade him before the public every day of his life, as having committed an offence of this very small character, for which they have elected to prosecute him criminally? I quite agree that they were at liberty several times to advertise the apology in order to inform the public that *Apollinaris* water of a spurious character had been sold, and thus to obtain some protection in their trade. But are they at liberty to repeat this every day of this man's life, and to parade this in the public papers, and make his life a burden to him? I think that this power which he gave them to advertise ought to be exercised in a reasonable and proper manner. A reasonable and proper manner would be to issue four or five advertisements at the interval of a week if they thought fit; but to continue, as I am satisfied they intend to continue, this as long as this man lives, to insult him every day by reminding the public that he has been prosecuted criminally, is, in my opinion, a most unreasonable and improper use of the apology, and one which, I think, this Court would be fully justified and called upon to prevent.

Now, with regard to the principles of law applicable to the case, I do not think there is much difficulty, because I take it on the broad ground that supposing this man had gone to trial and had been convicted of this offence (which I do not believe possible, if there is any truth in his statement)—but if he had been convicted of a misdemeanour, would they have been justified in inserting an advertisement every day of the man's life stating to the public that he had been on a certain day so convicted? A man expiates his offence by undergoing the sentence which the tribunals of his country impose upon him, and when he has completed the sentence, whatever it may be, whether the payment of a fine or imprisonment, nothing, in my

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Mr. *Glasse*, Q.C., and Mr. *Davey*, for the Appellants:—

This is either a libel or it is not, and in neither case can this Court interfere: *Prudential Assurance Company* v. *Knott* (1). The Plaintiff *Fisher* gave us authority to publish this, and how can

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opinion, can be more improper than that he should have it thrown in his face every day that he had been so convicted; and nothing can be more improper than that those who accept an apology should think it justifiable to use it for such a purpose. I am very much inclined to think that upon the law of the subject the decision in the case of *Williams* v. *Bayley* (Law Rep. 1 H. L. 200) is applicable to this case. [His Honour then stated the facts of that case.] Now the observations there made doubtless referred to the particular case then before the House of Lords, viz., compounding a felony. That was a felony, this was a misdemeanour. They have thought fit to compound a misdemeanour, and I am by no means satisfied that there is any justification for the course they have pursued. If they choose to compound a misdemeanour, I am inclined to think that the argument is very well founded, that they are not at liberty to avail themselves of the compounding of a misdemeanour to turn it to their profit, and certainly not to turn it to the destruction of the man from whom they have obtained such an apology. It is clear that Lord *Westbury* in that case did not intend to limit his observations to compounding a felony, because he says (p. 220): "Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now that is the principle of the law, and the policy of the law; and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed." A misdemeanour is also a crime, and proceeding on the ground that this apology having been accepted, the Defendants were bound to use it in a proper and reasonable, and not in an oppressive, manner, and not so as to destroy the commercial character of *Fisher*, and render it impossible, as he has alleged, for him to carry on his trade with any advantage. I think also that, inasmuch as they thought fit, instead of taking him to trial, to compound with him, they cannot turn that compounding to their own advantage. I also think that their proceedings were improper upon this ground—that they knew very well that the offence was so purely accidental and so trivial that if they had gone to trial the man would unquestionably, in my opinion, have been acquitted.

On every ground, therefore, the demurrer must be overruled.

(1) Law Rep. 10 Ch. 142.

he complain of us for doing so? If we were to be restricted, he should have made that part of the agreement. However, as a matter of fact, we have now discontinued the publication.

Mr. *John Cutler* (Mr. *Higgins*, Q.C., with him) for the Plaintiffs:—

If this is a libel, it is not certain that the Court will not interfere: *Dixon* v. *Holden* (1). Moreover, if this apology was given under duress, the agreement as to publication is void. It is contrary to law to convert a crime into a profit: *Williams* v. *Bayley* (2). No doubt the crime there was a felony; but the same rule applies to a misdemeanour, and it is doubtful whether compounding a misdemeanour is lawful: *Steph.* Comm. (3). Here they have traded on their knowledge of a crime having been committed, and are using that knowledge to crush a rival.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case must be discharged and the demurrer allowed.

The case is very simple. *Fisher* was found selling water, which was not *Apollinaris* water, in bottles bearing the mark of the *Apollinaris Company*. They did not sue him, as they might have done, either at law or in this Court, but they proceeded against him before a magistrate under the *Trade Marks Act* (25 & 26 Vict. c. 88). The question to be decided was, whether he was selling with a guilty knowledge that the water he was selling was not genuine. There was evidence on both sides, and the magistrate came to the conclusion that there was a case to go to a jury, and committed *Fisher* for trial, taking his own recognizances for his appearance. At the trial no evidence was given, and a verdict of not guilty was entered. It is not alleged when the agreement was made, but in pursuance of an agreement with the Defendants, *Fisher* signed and gave to them a written apology, which was no doubt part of the arrangement under which the prosecution was abandoned. [His Lordship then read the letter.] It was contended that the whole of this proceeding was against

(1) Law Rep. 7 Eq. 488. (2) Law Rep. 1 H. L. 200.
(3) 6th Ed. vol. iv. p. 321.

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the policy of the law, and that the Defendants had made an improper use of criminal proceedings to obtain this apology. No authority was cited for this proposition. The same apology might have been given and accepted if a suit in this Court had been threatened. This is one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the Defendants agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against the policy of our law to allow the injured person to enter into a compromise with regard to them. *Fisher* said that he bought the water, but rather eluded the main question; the company, however, accepted the apology, and were authorized by *Fisher* to use it as they pleased. This was the bargain which was come to by *Fisher* with full knowledge of what he was doing; and the Defendants have simply done what he authorized them to do. The publication under such circumstances can hardly be a libel, and even if it was, there is abundance of authority that this Court has no jurisdiction to restrain the publication of a libel merely because it is a libel.

But the Plaintiffs further complain that the Defendants are using this letter in a way which will do them material damage. I am not aware of any principle on which this Court can say whether such a thing can be used one hundred times or once. *Fisher* had at his trial the benefit of the apology, and I cannot see on what ground of equity this bill rests. It was said that the publication would damage *Fisher's* character, and therefore, indirectly, the property of the company who had bought his business. That really amounted to nothing but this, that the publication was a libel. The bill is not sustainable, and the demurrer ought to have been, and must be now, allowed with costs. There will be no costs of the appeal.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The question is, whether on this bill there appears any ground upon which a Court of Equity can restrain the publication of this apology. The most plausible

ground alleged is, that it was obtained under duress of criminal proceedings. But, in the first place, the bill does not allege that the apology was written before the acquittal, and even if the apology was written before the acquittal, that would be no reason for the interference of this Court. If this was any ground for restraining the publication, it would be a ground for restraining the first publication.

But, in my opinion, there is no objection to the compromise of a charge of this sort on such terms. The complaint was that *Fisher* had used the trade-mark of this company. Now, previously to the *Trade Marks Act* (25 & 26 Vict. c. 88), the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but under this Act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal Courts in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats.

It is clear, therefore, that the first publication could not have been stopped; and it is clear that, the first publication being lawful, there would, in the absence of any special agreement, be no ground for restraining the subsequent publication. No such agreement is alleged, and the Defendants are positively authorized to make such use of the letter as they may think necessary. The Defendants have been guilty of no legal wrong, and I cannot see that they are not entitled to publish this letter merely because it affects *Fisher's* character.

Solicitors: Mr. *A. E. Copp*; Mr. *Hacon*.

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Feb 19.

Ex parte MATHEWES. *In re* ANGEL.

Liquidation—Bills of Exchange—Bankruptcy Act, 1869, s. 126.

The acceptor of two bills of exchange, which had not to his knowledge been negotiated, took proceedings for liquidation by composition, and in his list of creditors entered the drawer as his creditor for the amount of the bills, without stating that the debt was due on bills of exchange. The bills had, in fact, been negotiated, and the holder received no notice of the meeting of creditors:—

Held, that the holder was not bound by the resolutions at the meeting, and was entitled to pursue his remedies irrespectively of them.

The resolution for a composition was confirmed on the 8th of October, 1874; the holder commenced an action on one of the bills of exchange on the 5th of November, and the first instalment of the composition was payable on the 9th of January, 1875:—

Held, that it was too late after this for the debtor to have time allowed him to remedy the mistake under the *Bankruptcy Act*, 1869, s. 126, clause 8.

THIS was an appeal by *Mathewes* from an order of Mr. Registrar *Brougham* staying without security all proceedings under a debtor's summons issued by him against *J. P. Angel*, until the Court in which any proceedings commenced or to be commenced by *Mathewes* against *Angel* for the recovery of the amount mentioned in such summons should have come to a decision thereon.

Angel, a trader, accepted two bills of exchange drawn upon him by *J. H. Langdon;* one, dated the 19th of June, 1874, for £46 2*s.* 9*d.*, and the other, dated the 1st of August, 1874, for £45 17*s.* 8*d.*, each being payable four months after date.

On the 12th of September, 1874, *Angel* presented a petition for liquidation by arrangement or composition, and in his list of creditors inserted *Langdon* as a creditor for £92 0*s.* 5*d.*, simply mentioning it as a debt without any reference to the fact of its being due on bills of exchange. The bills had, in fact, been indorsed to *Mathewes*, one on the 15th of July, and the other on the 11th of August. No notice was given to *Mathewes* of the liquidation proceedings, nor was he aware of them until after the first bill became due. The first general meeting of creditors was held on the 28th of September, and the requisite majority passed resolu-

tions to accept a composition of 5*s.* in the pound. These resolutions were confirmed at a second general meeting on the 8th of October.

On the 5th of November, *Mathewes* commenced an action against *Angel* on the first bill, and on the 10th of December served him with a debtor's summons for the amount of the two bills.

Angel applied to dismiss the summons, on the ground that *Mathewes* was bound by the composition, and on the hearing of the application, on the 22nd of December, the Registrar made the order under appeal.

On the 9th of January the first instalment of the composition became due, and was tendered to *Mathewes*, who refused to accept it.

On the 11th of January, *Mathewes* gave notice of appeal motion. The appeal was opened before the Lord Justice *James* on the 29th of January. His Lordship was clearly of opinion that the case was one which ought to be disposed of without a trial at law; but there appearing to be some doubt as to whether *Mathewes* was the holder of the bills at the time when the proceedings for liquidation were commenced, it being deposed by *Angel* that *Langdon* had, on the 8th of September, given him notice that he was still the holder of the bills, the order of the Registrar was discharged, and the appeal was ordered to stand over to the 19th of February for the examination of *Angel*, *Mathewes*, and *Langdon*. These parties were examined in Court, and it was established that *Mathewes* had become the holder, as stated above.

Mr. *Winslow*, Q.C., and Mr. *Aspland*, for the Appellant:—

Mathewes was the holder of the bills of exchange at the time, he is not entered as a creditor, nor have the provisions of the clause as to bills of exchange been complied with. *Mathewes*, therefore, is not bound by the composition, and is at liberty to proceed to make *Angel* a bankrupt.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for *Angel*:—

The case is within the intention of the proviso as to bills. *Angel* did not know that *Mathewes* was the holder, and honestly did the

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best he could by stating the amount of the debt and the person to whom he believed it to be owing.

[The LORD JUSTICE MELLISH:—This gave *Langdon* the power to vote. If *Angel* had entered the debt as due on bills of exchange, *Langdon* would have had to produce them before voting.]

If *Angel* had stated that he did not know the holder, *Langdon*, supposing he had not negotiated the bills, would have had ground of complaint, and would have alleged that there was no ignorance, as he had told the debtor two days before, that he still held the bills. In such a case it may be considered the duty of *Mathewes* to give notice to *Angel*. Will the Court lay down that because down to the last moment an acceptor cannot be sure that a bill has not been negotiated, he is to leave the holder out? If so, not a single bill-holder will ever be summoned.

[The LORD JUSTICE MELLISH:—Why should not the debtor state the particulars mentioned in the clause, and summon the person whom he believes to be the holder?]

The rules do not provide for any such double procedure. If the Court is against us, we ask that, as the case is one of innocent mistake, time may be allowed to cure the defect in the manner mentioned in sect. 126.

SIR G. MELLISH, L.J.:—

This is an appeal from an order of the Registrar staying proceedings on the ground that an action had been brought, and ought to be decided before anything else was done. The appeal first came before the Lord Justice *James*, who was of opinion that, subject to a matter of fact which could be easily ascertained, the case turned upon a question of law under the *Bankruptcy Act*, 1869, s. 126, and that it ought to be disposed of here without any action. The appeal, therefore, was ordered to stand over, that witnesses might be examined before us to determine the only material fact that was in dispute, viz., whether *Langdon* had parted with the bills and *Mathewes* was the holder of them at the time of the petition. *Mathewes* has deposed to the dates at which the bills came to his hands, and has fortified his evidence by pro-

ducing the cheques he gave for them, and it is established that he was the holder of them at the time of the petition. The question, then, is, whether *Angel* is discharged. He cannot be discharged unless the Act says so, and we cannot alter the Act, even if such a case as this should appear to be omitted from it by oversight. But, on the fair construction of the Act, I think there is no omission. The name and address of *Mathewes,* and the amount due to him, were not entered in the list of debts; he, therefore, according to the 7th clause of the 126th section, is not bound, unless the case can be brought within the following clause, relating to debts due on bills or notes. Does he, then, come within that clause? *Angel* did not know who was the holder of these bills. It may be that he thought he knew. I do not think we need enter into the question whether he ought not, under the circumstances, to have doubted whether *Langdon* was the holder of them. I will assume that he honestly and *bonâ fide* believed him to be so. But he was mistaken; he did not really know, and he did not do what the Act says that, if he does not know the holder, he must do. The concluding words of the clause provide for what was to be done when he found out his mistake. "Any mistake made inadvertently by a debtor in the statement of his debts may be corrected, after the prescribed notice has been given, with the consent of a general meeting of his creditors." The debtor has not taken this course, he has not summoned a meeting, and it is too late for the Court to allow him to have it called now. The time for payment of the first instalment is past. The action was commenced on the 5th of November, and up to this time no steps have been taken to correct the mistake. There is no section in the Act that deprives *Mathewes* of his rights, and he is therefore entitled to pursue his ordinary remedies as a creditor. The debtor's application to dismiss the summons must be dismissed with costs.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Messrs. *Spyer & Son;* Messrs. *Keene & Marsland.*

L. JJ.

1875

March 11, 18,

Ex parte CAREW. *In re* CAREW.

Bankruptcy—Composition—Surplus in Hands of Trustee after Payment of Composition—Rights of Creditor who is not bound by the Composition—Jurisdiction—Bankruptcy Act, 1869, *ss.* 72, 126—*Bankruptcy Rules*, 1870, *r.* 281.

A creditor whose name and the amount of whose debt are not entered in the statement of a compounding debtor, and who is, therefore, not bound by the composition, may nevertheless take advantage of the composition and prove his debt, and claim a share in the fund in the hands of the trustees.

A resolution having been passed at a meeting of creditors to accept a composition from a debtor, the debtor paid a sum of money to the trustee which was more than sufficient to pay the composition to all the creditors whose names and debts were entered in his statement. Other creditors who were not bound by the composition had previously filed a bill in Chancery against the debtor and certain persons, charging them with a breach of trust. They did not come in and prove this debt in the composition, but simply gave notice to the trustee of their claim. After all the creditors who were bound by the composition had been paid, the debtor applied to the Court to order the trustee to pay back the surplus of the fund to him :—

Held, that the Court had jurisdiction to entertain the application under the 72nd section of the *Bankruptcy Act*, 1869, and to take the necessary accounts between the trustee and the debtor:

But *held*, that the Plaintiffs in the Chancery suit had a right to take advantage of the composition, although they were not bound by it, and that the Court would not make an order as to the disposal of the surplus until a decree had been made in the Chancery suit.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy.

In the year 1873 the infant children of Lady *Pigott* filed a bill against Sir *H. Stewart* and Mr. *B. F. H. Carew*, charging them with a breach of trust respecting a trust fund of £2215 5*s.* 10*d.*, and seeking to make them liable to replace that sum with interest.

On the 8th of May, 1874, *B. F. H. Carew* filed a petition for liquidation. In the statement of his liabilities which he produced to his creditors he inserted the following entry :—

"Lady *Pigott's* Executors.

"A claim has been made upon Mr. *Carew*, as one of the execu-

tors of his late father, for £1150 and interest for about twenty-five years at 4 per cent., in respect of Lady *Pigott's* one-fourth share in the personal estate of the late Mr. *Carew*, senior, to which she was entitled by will, but which was never paid to her, the amount having been appropriated by one of the co-executors. The other surviving co-executor with Mr. *Carew* is Sir *H. Stewart*. The liability is not admitted, but for the purpose of this account it is estimated at £1500."

The first meeting of creditors was held on the 4th of June, 1874, and was adjourned to the 23rd of July, when a resolution was passed by the requisite majority of creditors to accept a composition from Mr. *Carew* of 19*s.* 11*d.* in the pound, payable fourteen days after the registration of the resolution, and two trustees were appointed. It was also resolved that the terms of the composition should be embodied in a deed to be executed by the debtor, the trustees, and the creditors. These resolutions having been duly confirmed, a deed, dated the 18th of August, 1874, was executed in pursuance of the resolutions. This deed was made between the debtor of the first part, the trustees of the second part, and the creditors whose names and addresses and the amount of whose debts were shewn in the statement produced at the meeting and in the schedule thereinunder written of the third part, and the debtor thereby covenanted to pay to the trustees, within fourteen days after the registration of the resolution for composition, an amount sufficient to pay to the creditors 19*s.* 11*d.* on their respective debts; and the deed contained the clause declaring that on payment of that sum the debtor should be discharged from all debts due to the said creditors respectively.

In order to meet this composition the debtor borrowed a sum of £26,000 from the *Eagle Insurance Company*, and paid it, with a further sum of £819, to the trustees of the deed.

No one appeared to represent the Plaintiffs in the suit of *Pigott* v. *Stewart* at the meetings of creditors, nor did any one on their behalf execute the deed; but on the 3rd of June, 1874, before the first meeting, the solicitors for the Plaintiffs sent to the solicitors acting for the debtor, who afterwards acted also as the solicitors for the trustees, a written notice that a Chancery suit was pend-

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ing, and that the Plaintiffs and *Mary Waugh*, as guardian and next friend of the infant children of Lady *Pigott*, claimed to be creditors of *B. F. H. Carew* for the sum of £2215 5*s.* 10*d.*, being money of which the debtor was a trustee, and which was lost or misapplied by him, together with interest thereon. This claim was accordingly mentioned in the schedule of Mr. *Carew's* debts, which was furnished to the *Eagle Insurance Company* on the occasion of the advance by them, and they made it an express condition of the loan that a sufficient sum of money should be retained by the trustees to meet the claim.

The trustees, having received the money from the debtor, informed the solicitors for the Plaintiffs in the suit that they had set aside £2500 to meet their claim, and would hold it to abide the result of the hearing of the suit; and no further steps were taken on behalf of the Plaintiffs in the matter.

The trustees paid the composition to all the creditors mentioned in the debtor's statement, and there remained in their hands a sum of £2148 2*s.* 8*d.* unapplied.

The debtor applied to the trustees to pay this balance to him, but the trustees declined to do so, on the ground that the trustees had to retain the balance of £2148 2*s.* 8*d.* until the suit of *Pigott* v. *Stewart* was disposed of.

The debtor then applied to the Registrar for an order for the payment of the sum in the hands of the trustees to him, but the Registrar was of opinion that the Court had no jurisdiction to make the order, and refused the application. The debtor appealed from this decision. The suit of *Pigott* v. *Stewart* had not yet come on for hearing.

Mr. *Winslow*, Q.C., and Mr. *Bradford*, for the Appellant:—

With respect to the jurisdiction, we contend that the Registrar had power to go into the accounts between the trustees under a composition and the compounding debtor, and to determine any question between them under the 72nd section of the *Bankruptcy Act*, 1869. But he could only entertain questions arising out of the composition, and not questions between the trustees and strangers to the composition. The Plaintiffs in the Chancery

suit are not bound by the composition. They were not entered in the list of creditors contained in the debtor's statement in the specific manner in which creditors are required to be entered by the 126th section of the *Bankruptcy Act*, 1869, which requires the name and address of each creditor, and the amount of his debt; and they cannot take advantage of it by claiming any of the fund paid to the trustees under its provisions. If the money paid to the trustees to meet the composition had been insufficient, could the Plaintiffs in the Chancery suit have come in and diminished the composition of the creditors who were parties to the deed? Their remedy for the breach of trust is by proceeding against the debtor personally: *Ex parte Rumboll* (1); *Ex parte Lyons* (2); *Megrath* v. *Gray* (3); *Ex parte Jacobs* (4); *In re Littler* (5); *Field* v. *Lord Donoughmore* (6); *Bankruptcy Act*, 1869, s. 45; *Bankruptcy Rules*, 1870, r. 281.

[SIR G. MELLISH, L.J., referred to *Ex parte Botting* (7).]

Mr. *Roxburgh*, Q.C., and Mr. *E. C. Willis*, for the Plaintiffs in the Chancery suit:—

It is true that the entry of the claim for the breach of trust in the debtor's statement is imperfect, so that the infants could not have been bound by the composition, nevertheless they may take advantage of it and prove their claim. It could never have been intended that a debtor might intentionally or through carelessness omit a creditor from his statement, and so prevent him from participating in the property which has been made over to the trustees for the benefit of his creditors. If the matter had been in bankruptcy or in a liquidation, there can be no doubt that the Plaintiffs could have made a claim, and the Court of Bankruptcy would have retained the fund till the Chancery suit had been decided. The Plaintiffs did all that they could by giving notice to the trustees and to the debtor.

Mr. *De Gex*, Q.C., and Mr. *F. Turner*, for the trustees.

(1) Law Rep. 6 Ch. 842.
(2) Ibid. 7 Ch. 494.
(3) Ibid. 9 C. P. 216.
(4) *Ante*, p. 211.
(5) Law Rep. 18 Eq. 249.
(6) 1 D. & War. 227.
(7) Law Rep. 19 Eq. 261.

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Mr. *Northmore Lawrence*, for the solicitors who acted for the debtor in the composition.

SIR G. MELLISH, L.J.:—

In this case Mr. *Carew*, the debtor, presented a petition, and, under the 126th section, his creditors came to resolutions that there should be a composition of 19*s.* 11*d.* in the pound, which was to be carried out by a deed. Mr. *Carew* borrowed from an insurance company and raised a large sum of money, which he paid into the hands of a trustee appointed by the creditors for the purpose of paying the composition. Then, in the statement which he filed of his debts, he mentioned that there was a claim, as he described it, by the executors of Lady *Pigott* in respect of a breach of trust, which had been made against him. He stated that he disputed his liability, and he put the amount at £1500. There can be no doubt that that was not such a description of the name and address and amount of the debt that the persons who really were entitled, who were the infant children of Lady *Pigott*, who were carrying on a suit in Chancery against *Carew*, would have been bound under the provision of the section, which says that the provisions of a composition shall be binding "on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors." The guardians who represented the infants did not attend at any of the meetings, but sent notice, both to *Carew* and the trustees, what the nature of their claim was. All the other creditors have received their composition of 19*s.* 11*d.* in the pound, and there remains a sum of upwards of £2000 in the hands of the trustees, and this is an application by Mr. *Carew* for that sum to be paid out to him.

Now, the first question raised was, whether the Court had any jurisdiction to entertain the question; and I am of opinion that if the trustees had no valid reason why they should not pay over the sum, an order to that effect might have been made by the Court of Bankruptcy; and even if it be necessary to take the account as between the debtor and the trustees, I think that such an account might be taken in the Court of Bankruptcy. It appears to me to

come within the 72nd section as "a question of law or fact arising in any case of bankruptcy coming within the cognizance of such Court." It has been held that a composition is a case of bankruptcy within that section; and as it is clear that any creditor who claims a share of the composition might make an application against the trustee under that section, I also think that if there happens to be a surplus which has to be paid over to the debtor, any question respecting that surplus may be raised in the Court of Bankruptcy, and that the Court of Bankruptcy may take the necessary accounts between the debtor and trustee, and order the trustee to pay over the surplus to the debtor. Therefore that raises the question whether such an account ought now to be taken in this case, or whether it is right that the parties should wait until the suit in Chancery has been decided, and until it is ascertained whether the infant children of Lady *Pigott* will or will not have any claim against *Carew*.

It is therefore necessary to decide first whether any creditor of a compounding debtor who is not bound by the composition on account of his name, address, and the amount of his debt not having been properly entered, may nevertheless, if he is so minded, take advantage of the composition. I am of opinion that this clause in the 126th section, which says that a composition shall only be binding on those creditors whose names and addresses and amounts of the debts are shewn in the statement of the debtor, is put in for the benefit of the creditors for the purpose of compelling the debtor to give an accurate description of the names of his creditors and the amounts of their debts, but was not put in for the benefit of the debtor, so as to enable him to leave out any particular creditor whom he might please, either on purpose or by mistake, so as to deprive those creditors, if they should think it for their advantage, to come in under the composition. Therefore, when a subsequent clause says, "The provisions of any composition made in pursuance of this section may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court," I am of opinion that an application might be made under that enactment, not only by a creditor who is bound because his name, address,

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and the amount of his debt had been properly entered in the statement, but by any creditor of the debtor who would, in case of his being made a bankrupt, or in case of a liquidation, have been entitled to prove his debt. Of course if there is no trustee, or no funds paid into the hands of the trustee, it would probably not be for the advantage of the creditor to come for the composition, when he could proceed against the debtor for the whole sum; but if security is given for the composition, or if money is paid, or property conveyed to the trustees, for the purpose of paying the composition, then it may very possibly be for the advantage of a creditor rather to come in for the composition than to seek his other remedies. If he does not come in at the first or second meeting, or give notice to the other creditors in proper time, I should probably be of opinion that he could not interfere with the rights of the other creditors, and could not prevent them from realizing their composition by calling upon the trustees to keep back a sum for him. But as against a debtor, if the debtor has paid a sum of money to the trustees in trust to pay all his creditors, and all the creditors except one particular creditor have been satisfied, I cannot see any good reason why such creditor should not be entitled to prove his claim, and to have the benefit of the money which has been paid into the hands of the trustee for the general benefit of the creditors. If it were a case of bankruptcy or liquidation, it would be clear that a creditor who was suing the debtor with other persons in Chancery, might present his claim, and might ask the Court of Bankruptcy to postpone the proof of the debt until the case had been decided in Chancery.

In this case, having regard to the nature of the claim—a claim for a breach of trust brought against the debtor and other co-trustees with him, I think that if a proper application had been made to the Court of Bankruptcy it would have been quite right for that Court to say that it could not enter into the question of proof then, as there were other persons involved; that the suit in Chancery had proceeded a considerable way, and was shortly about to be decided; and that the most convenient mode of ascertaining whether there was a valid claim or not was to allow the suit in Chancery to come to a hearing, and the decree to be made. That course it would have been clearly competent for the Court of

Bankruptcy to follow in the case of bankruptcy or liquidation, and in my opinion it may also be followed in a case of composition, where there is a sum of money in the hands of the trustee, so that it may be for the advantage of the creditor if he establishes his debt to get the benefit of that sum; and in my opinion it would be wrong to order the trustee to pay the surplus back to the debtor when it is possible that a creditor may still establish a valid claim, which was really a debt, although it had not been proved at the time the composition was entered into.

I am of opinion, therefore, that no order ought now to be made on the trustee to pay back this balance; but that the Court of Bankruptcy ought to wait till it has seen what the result of the suit in Chancery is, and enable these infants to make a proper application if they succeed in obtaining a decree in the Court of Chancery. I think the order of the Registrar ought to be affirmed, and the appeal dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. The appeal will be dismissed without prejudice to any application which may be made by Mr. *Carew* when the amount of the debt is ascertained. I desire to add this also with regard to the question of jurisdiction. In taking the accounts between the debtor and creditors the Registrar has jurisdiction to take any account necessary to settle the amount between the trustees and the debtor. He must dispose of every question which is really necessary for the purpose of ascertaining what the right balance in hand is.

Solicitors: Mr. *W. Webb;* Messrs. *Paine & Hammond*; Mr. *Luscombe;* Messrs. *E. F. & Benn Davis.*

L. JJ.
1875
Feb. 22.

In re CHARLES LAFFITTE & CO.

Practice—Inrolment of Order—Cons. Ord. XXIII., r. 26.

20 Eq 642

An inquiry as to damages having been directed on a claim under a winding-up, the official liquidator applied to have it conducted in Court and before a jury. This application was dismissed on the 11th of December, 1873. The official liquidator gave notice of appeal to the House of Lords, but not until after the period of three weeks from the dismissal had expired. After the damages had been assessed in Chambers the official liquidator, on the 9th of February, 1875, obtained *ex parte* a conditional order for leave to inrol the order of the 11th of December, 1873, but on hearing the other side this conditional order was discharged:—

Held, on appeal, that liberty to inrol the order of December, 1873, ought not to be granted.

THIS was an appeal by the official liquidator of *Charles Laffitte & Co., Limited*, from an order of Vice-Chancellor *Bacon* discharging an *ex parte* conditional order for inrolment.

Mr. *Charles Laffitte* carried in a claim as a creditor under the winding-up. This claim ultimately went before the House of Lords on appeal, and an order was finally made, not admitting him as a creditor for a liquidated sum, but directing an inquiry what damages he had sustained by the breach of the contract between him and the company. In July, 1873, the official liquidator took out a summons that the evidence on this inquiry might be taken in Court and before a jury. The Master of the Rolls, to whose Court the matter was attached, desired that the case might be transferred to another branch of the Court, as he had been counsel for the official liquidator against the claimant at a previous stage. An application was accordingly made to the full Court of Appeal for a transfer, which was ordered, the Lord Chancellor (Lord *Selborne*) and the Lords Justices all, however, expressing a decided opinion that the application for a jury was one which ought not to be granted. The summons, having been adjourned into Court, was dismissed with costs by Vice-Chancellor *Bacon* on the 11th of December, 1873.

On or about the 9th of January, 1874, a full week after the expiration of the three weeks limited by the *Companies Act*, 1862,

s. 124, the official liquidator gave notice of an appeal to the House of Lords from this order. Mr. *Laffitte's* solicitors sent back the notice as being out of time. The solicitors of the official liquidator wrote back to say that sect. 124 did not apply to appeals to the House of Lords. On the 15th of January, 1874, Mr. *Laffitte's* solicitors wrote a reply disputing this, and stating their intention to oppose any application to the House of Lords, and in the meantime to proceed as if no notice of appeal had been given.

Nothing further passed on the subject. The inquiry as to damages went on, the damages were assessed, and a consequent order was made by Vice-Chancellor *Bacon* on the 12th of December, 1874, giving Mr. *Laffitte* as much as he had claimed. On the 8th of February, 1875, the solicitors of the official liquidator informed Mr. *Laffitte's* solicitors that they were advised to appeal to the House of Lords against the orders of the 11th of December, 1873, and the 12th of December, 1874, and that on the following day an application would be made to Vice-Chancellor *Bacon* for leave to inrol the former of these orders, and they requested Mr. *Laffitte's* solicitors to consent to this order being made absolute at once, which Mr. *Laffitte's* solicitors declined to do. On the 9th of February a conditional order for leave to inrol was made on an *ex parte* application of the official liquidator. Mr. *Laffitte* gave notice of motion to discharge this order, and on the 12th of February it was discharged with costs.

Mr. *Jackson*, Q.C., and Mr. *Graham Hastings*, for the official liquidator, in support of the appeal, referred to *Banner* v. *Johnston* (1); *Kay* v. *Smith* (2); Cons. Ord. XXIII., rr. 25, 26.

Mr. *Kay*, Q.C., and Mr. *Waller*, Q.C., for the Respondent, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor is quite right, though I should have been glad if I could have thought otherwise; for if we are wrong as to the propriety of having a jury in such cases, we should be glad to have a decision by the House

(1) Law Rep. 5 H. L. 157. (2) 7 D. M. & G. 383.

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of Lords for our guidance. The rule, which says that an order is not to be inrolled after six months without special leave, must be founded on the consideration that in the course of six months such things may be done that parties ought not to be allowed to go to the House of Lords, and that, therefore, it is desirable to give the Court a judicial discretion as to whether inrolment should be allowed. This appears particularly to apply to a question as to the mode in which a case ought to be tried. During the period which has elapsed since the order of the 11th of December, 1873, was made, the case has been tried, and great expense incurred. After the official liquidator has allowed so much expense to be incurred in proceeding under the order, it would be doing great injustice to the opposite party if we were to give the official liquidator an opportunity of going to the House of Lords to set aside that order and all the proceedings under it. In my opinion we have a judicial discretion in the matter, and I think we are bound to exercise it against the Appellant. He had ample time for appealing against the order, but allowed the proceedings under it to go on, and it is not until the result of those proceedings has turned out unfavourable to him that he comes to complain of the order.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Of all orders, an order as to the mode in which a case is to be tried is the one an appeal from which, if brought at all, ought to be brought speedily. It is unreasonable that a party should take his chance of a favourable decision before he appeals. It is true that the trial might take place before the appeal could be heard, but in that case the other party would suffer no wrong, for, having notice of the appeal, he would take the case down for trial at his own peril.

Solicitors: Messrs. *Combe & Wainwright;* Messrs. *Stevens, Wilkinson, & Harries.*

CAVENDISH *v.* CAVENDISH.

L. JJ.
1875
Feb. 15.

[1873 C. 180.]

Vendor and Purchaser—Specific Performance—Title—Trust for Sale—Sale by one Contract of Properties held on distinct Trusts—Apportionment.

A messuage belonged to a testator, who devised his real estate in trust for sale. An adjoining messuage was vested in the trustees of his settlement upon trust for sale, and the purchase-money, subject to the payment of definite sums, belonged to the testator's estate. Under a decree for administering the testator's estate the two messuages were put up for sale together in one lot, and it was provided that the purchase-money should be paid into Court to the credit of the cause, "The proceeds of the sale of the testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, and that it was to be paid into Court in a suit unconnected with the settlement:—

Held (affirming the decision of *Malins*, V.C.), that this objection was not sustainable, for that the Court, having the money in its custody, would see it properly applied. The Court, however, for the satisfaction of the purchaser, ordered that the purchase-money should be apportioned, and the part apportioned to the settled messuage paid into Court to a separate account.

THIS was an appeal by a purchaser from an order of Vice-Chancellor *Malins* ordering him to pay his purchase-money into Court.

General *Cavendish* died in April, 1873, having by his will devised his real estate to trustees upon trust for sale. By a decree dated the 19th of July, 1873, made at the suit of a person beneficially interested under his will, the usual accounts were directed of the testator's personal estate, debts, legacies, and annuities, and inquiries as to his real estate, and the real estate of the testator was ordered to be sold and the money paid into Court to the credit of the cause to the account, "The proceeds of the sale of the testator's real estate."

The testator was at his death owner in fee of a house known as *Cavendish Mansion*.

By the testator's marriage settlement, dated the 22nd of October, 1811, a large amount of personal estate was settled upon

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trusts, under which, in the event of General *Cavendish* surviving his wife (which happened), the trustees were, after his decease, to hold the funds in trust to raise, for the portions of the children of the marriage, sums varying according to the number of children, amounting (in the events which happened) to £70,000, and subject thereto (in the events which happened), upon trust for General *Cavendish*, his executors, administrators, and assigns. The settlement contained a clause empowering the trustees to invest any part not exceeding one moiety of the trust funds in the purchase of real or leasehold estates, which were to be held by the trustees upon trust for sale with power to give receipts, the moneys arising from the sale to be held on the original trusts. The trustees, in 1848, under this power, expended £6000, part of the trust funds, in the purchase of a freehold house, 33, *Old Burlington Street*, adjoining the *Cavendish Mansion*.

The house, 33, *Burlington Street*, appeared to have been regarded by all parties as belonging to General *Cavendish* subject to a charge, and was treated as included in the direction for sale contained in the decree. On the 27th of April, 1874, the trustees of the settlement obtained an order giving them leave to attend proceedings under the decree, so far as related to the sale of the two houses.

The two houses were offered for sale by the direction of the Judge in one lot. The conditions provided that the purchaser should pay his purchase-money into Court to the credit of the cause, "The proceeds of the sale of the testator's real estate." The eighth condition provided for the commencement of title to the *Cavendish Mansion*, and then proceeded to deal with 33, *Burlington Street*, as to which it was stipulated as follows:—"As to *Burlington Street*, this property was purchased in 1848 by the Duke of *Bedford* and others, trustees of the marriage settlement of the late General *Cavendish*, and all now deceased. The present vendors being the trustees of such settlement, in which there is a trust for sale with power to give receipts in the trustees thereunder, no inquiry or objection whatsoever shall be made as to the right to the purchase-money or any part thereof, or the parties entitled thereto, or to the same being paid into Court in the cause, together with the purchase-money for the premises in *Burlington Gardens*,

which are part of the estate of the late General *Cavendish* which is being administered in such cause, the premises in *Burlington Street* being also, it is believed, part of the same estate under such marriage settlement, to be determined, if necessary, in the cause; but as to this the purchaser shall not be entitled to make any inquiry or raise any objection."

The purchaser took the objection that it did not appear from the abstract that there was any right or power to sell the *Burlington Street* house in the lump with the *Cavendish Mansion* as part of the estate of General *Cavendish*, and have the purchase-money paid into Court in that cause. Vice-Chancellor *Malins* decided that the objection was invalid, and ordered the purchaser to pay his money into Court. It was not disputed that the two properties, if sold together, would sell better than if sold separately.

Mr. *Phear*, for the purchaser, in support of the appeal:—

In this case two properties, vested in different trustees and held on different trusts, are sold by one contract for one lump sum, which is to be paid into Court in a suit relating only to one of them. The case is governed by *Rede* v. *Oakes* (1). If provision had been made for apportionment of the purchase-money and payment of the part attributable to the settlement to the proper parties, the purchaser would not have taken any objection; but a payment into Court in a suit which has nothing to do with the settlement is no answer to the persons entitled under it.

The LORD JUSTICE JAMES:—The money is to come into Court, and the trustees of the settlement are before it. The Court will see that the money comes to the right hands.

Mr. *J. Pearson*, Q.C., and Mr. *Bailey*, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L.J.:—

The sale of the two houses together is clearly beneficial to all parties, and the objection taken is of the most technical character.

(1) 4 D. J. & S. 505.

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The purchase-money may, however, at once be apportioned in Chambers, which will only require an affidavit by the surveyor who has been employed about the sale. The part apportioned to 33, *Old Burlington Street*, may then be paid in to a separate account so as to distinguish it. We vary the order in this way, not because we differ from the Vice-Chancellor, but through tenderness for the over scrupulosity of the purchaser.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Bailey, Shaw, Smith, & Bailey;* Mr. *Last.*

L. JJ. 1875 Feb. 19.

Ex parte JARDINE. *In re* McMANUS.

Deed—Parcels—Reference to Contemporaneous Inventory—Enlarging Operation of Deed.

A mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brass work, wrought and cast iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock-in-trade in and upon the before-mentioned foundry, workshops, and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors:—

Held (affirming the decision of the Chief Judge), that the stock-in-trade was not included in the mortgage.

THIS was an appeal from a decision of the Chief Judge.

On the 1st of August, 1873, *Michael McManus* and *George Louis Frost*, who were then carrying on the business of ironfounders in

partnership at the *St. Paul's Foundry, Blackburn,* executed a mortgage in fee of their foundry, and a bill of sale of their steam-engines, fixtures, tools, and working plant, to *William Jardine,* to secure the repayment of £4000 with interest.

The chattels assigned by the deed were thus described:—

"All those, the steam-engines, boilers, mill-gearing, shafting, steam, gas and water-piping, shelving, wall or other boxes, counter swivels, loom bins, boring mills, pulleys, spindles, steam-hammers, weighing machine, moulding machine, travelling and other cranes, fans, cupolas, drums, turning, drilling, and other lathes, and all other fixtures, machinery, implements, utensils, tools, and all other the working plant, being in, upon, and attached, or fixed immediately or mediately to, or used in or about the said plot of land and buildings, or any part thereof, and more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents."

The *habendum* was to hold the land and buildings, and such part of the steam-engines and other premises granted and assigned as were of the nature of fixtures, to *Jardine* in fee, subject to redemption as therein mentioned, and to hold such parts of the premises as were not of the nature of fixtures to *Jardine* absolutely, subject to redemption as therein mentioned.

The deed contained a power of sale by the mortgagee in case of default in the payment of principal or interest on the day appointed for payment, and a power for the mortgagee in case of such default to enter into and take possession of all or any of the hereditaments and premises granted and assigned by the deed. There was also a covenant that the mortgagors would not pull down or remove the hereditaments and premises expressed to be thereby granted and assigned respectively without the permission of the mortgagee, unless in cases where such pulling down or removal should be rendered necessary by any of the premises being worn out or injured, and in such cases that the mortgagors should replace the premises or articles worn out or injured by others of at least equal value, and that they would, during the

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continuance of the security, keep the hereditaments and premises, and every part thereof, in a good state of repair and in perfect working order.

There was also this clause:—

"And it is hereby agreed and declared that any buildings, machinery, implements, utensils, and working plant which shall be erected or placed upon, or used, or be in or about the said hereditaments hereinbefore expressed to be hereby granted, or any part thereof, during the continuance of this security, either in lieu of or in addition to any buildings, engines, machinery, implements, utensils, or working plant now standing or being there, shall be included in the present security, and be subject to the provisions and covenants herein contained."

There was no mention of stock-in-trade in the deed.

The inventory referred to in the deed was signed by the mortgagors on the 1st of August, 1873. It was headed thus:—

"Description, measurement, and inventory for valuation of the *St. Paul's* foundry, workshops, and premises, situate in *Nab Lane, Blackburn*, in the county of *Lancaster;* also of the steam boiler, steam shafting, piping, tools, working plant, machinery, and all other attached fixtures and fittings, smiths' hearths, office furniture, and other effects, the property of *Michael McManus* and *George Louis Frost*, as valued by us whose names are hereunto subscribed, this 26th of July, 1873."

The inventory was contained in twenty-one pages, which included a description in detail of the fixtures and other articles in each room or shop of the foundry and offices thereto belonging, followed by a detailed description of loose working plant, such as moulding boxes, tools, and patterns. At the bottom of page 20 were these words:—

"The stock-in-trade consists of bolts, brass work, wrought and cast iron work, brass and other work, both finished and in preparation."

Page 21 was as follows:—

"Also all cast and wrought iron, steel, timber, and all other

stock-in-trade in and upon the before-mentioned foundry, workshops, and premises.

"The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the *St. Paul's Foundry, Blackburn*, mortgaged by us this day to Mr. *William Jardine* for securing the sum of £4000 and interest.

"Dated this 1st of August, 1873."

Then followed the signatures of *Frost* and *McManus*.

The deed was registered under the *Bills of Sale Act*.

On the 18th of October, 1873, *Frost* died, and the business was thenceforward carried on by *McManus* alone. Default was made in payment of the mortgage money, and on the 1st of February, 1874, *Jardine* took possession under the deed. *McManus*, in April, 1874, filed a liquidation petition, and the question arose between *Jardine* and the trustees under the liquidation whether the debtor's stock-in-trade was included in the mortgage. *Jardine* claimed it under the deed and inventory, and had taken possession of it as included in his security. The Judge of the *Blackburn* County Court by his order declared that the stock-in-trade was not included in the security, but was the property of the trustees, and this decision was affirmed by the Chief Judge (1). *Jardine* appealed.

(1) 1875. Jan. 18.

SIR JAMES BACON, C.J.:—

Mr. *Ambrose* has very properly said that this case must be determined according to the true intention of the parties. But in considering the intention of the parties, I must have strict and due regard to the instrument by which that intention is expressed. Departing, however, from that for a moment, if I were to consider what was likely to be the intention of these parties, what circumstances present themselves to my mind? Evidence there is none on the subject that I know of, and I have heard of none. Two traders, being manufacturers in, as it seems from the inventory, a very large way of business, have occasion to borrow £4000, and they borrow it on a mortgage of their property. To what end? In order that they may carry on their business. It would require a plain and distinct stipulation before I could entertain the notion that it was their intention to mortgage their stock-in-trade. But if it was their intention to give an equitable charge on it, as in *Brown* v. *Bateman* (Law Rep. 2 C. P. 272), they could not proceed to sell anything without the permission of

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Ex parte JARDINE.

In re MCMANUS.

Mr. *Ambrose*, Q.C., and Mr. *North*, for the Appellant.

Mr. *Little*, Q.C., and Mr. *Smyly*, for the trustees, were not called upon.

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the mortgagee, and such an intention seems to me to be totally foreign to the contemplation of the parties. They may well have intended to give to the mortgagee as large a security as they could over their whole available property, from the real property down to the working plant, but I cannot impute to them an intention to give a charge upon the things that they were at work upon every day, although those things may be mentioned in the inventory. When I look at the deed I find it to be consistent with that which I must take to have been their intention, and with nothing else. The deed is not unskilfully prepared. It appears to me, so far as I have looked at it, to have come from the hands of a person who knew his business very well, and who intended to throw the net very widely, and to give to the mortgagee all that it could be the intention of the parties to give him. [His Honour read the description in the deed of the property assigned.] I cannot extend that to whatever I find in the inventory. I must look at the words and see what things are "more particularly enumerated and specified," but I am not at liberty, by means of the inventory, to include things which were not in the contemplation of the parties, and which are covered by no one of the words by which they have expressed their intention in the deed. Reading the inventory in that way, the stock-in-trade seems to me to be out of the question. First, it is not mentioned in the deed, and I cannot assume that it was in the contemplation of the parties. Then, I am told that the inventory is referred to in the deed, and extends the operation of the deed. The history of the inventory I do not know—but it describes itself thus:—[His Honour read the heading of the inventory.]

Now if it were a mere valuation, it would be quite proper that everything should be included, and that is the purpose for which it seems to me that this inventory was originally made. Then a very long inventory follows this description, including the whole of the things which are mentioned in the deed, some by a very particular, some by a very general description. [His Honour then read the passages referring to the stock-in-trade and the memorandum at the end, and continued:—] That by no means leads to the inevitable conclusion that the stock-in-trade was to be included in the mortgage. The stock-in-trade is said to consist of certain things; the memorandum states that the inventory consists of twenty sheets, and that the contents of the twenty sheets are a complete and exact inventory of the things in and upon the *St. Paul's Foundry* mortgaged to Mr. *Jardine* as security for £4000. That does not by any means add to the expressions in the deed; it does not mention the stock-in-trade, which, as I have said, by the general intention of the parties (which I quite admit ought to prevail), it could not be in their contemplation to include in the mortgage. In terms it is not included in the mortgage, and I can see no ground whatever upon which the mortgagee, whose right to the property mortgaged, down to the

SIR W. M. JAMES, L.J.:—

There is no doubt about this matter. The deed is as clear as a deed can be, and shews no intention to include, but a plain intention to exclude, the stock-in-trade. The words in the witnessing part are precise, and it has not been attempted to be argued that they could, taken by themselves, include stock-in-trade. The clause as to replacing things worn out clearly applies only to what has been assigned, and does not alter the case. But it is said that the words are enlarged by the inventory. The inventory is not a part of the deed, but is made a part of it for the purpose of giving a more detailed description of the articles included in the deed. This inventory also contained a list of things of an entirely different nature, and the argument is, that therefore they are included in the deed. In my opinion, the reference to the inventory has no such effect. If something clearly within the terms of the deed had been omitted from the inventory, such omission would not have prevented its passing by the deed. So, on the other hand, we cannot hold the scope of the deed to be enlarged by a mere reference to a detailed catalogue of the things which were intended to be conveyed. Even if an express intention to include articles not coming within the terms of the deed had been shewn by a separate writing, that could not have made the deed operate in a way inconsistent with its plain terms, however it might lay

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working plant, is conceded by the trustees, can also claim that stock-in-trade which it was never in the contemplation of either party should be included in the mortgage. Authorities have been cited, and I quite agree that an inventory, when properly referred to, is to be read as part of the deed which refers to it. I do not dispute that *Brown* v. *Bateman* was well decided; it would not become me to do so. But in that case the landlord, by the instrument which had there to be considered, had stipulated that if the tenant, who was a builder, should bring on the land any materials for building houses, they should be considered as immediately attached to the premises, and should not be removed without the landlord's consent. That has no reference whatever to the case before me. There is no such stipulation here. If there had been a stipulation that the mortgagors should carry on the business and render accounts, shewing the mortgagees how they were dealing with the stock-in-trade, it might be said that *Brown* v. *Bateman* had some application; but as the case stands it has no application whatever. I conceive that the order now appealed from is right, and that it must be retained. The appeal must, consequently, be dismissed.

L. JJ. 1875 *Ex parte* JARDINE. *In re* MCMANUS.

ground for rectifying it. But in the present case it is impossible to conclude that the parties had any intention to include the stock-in-trade.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Pritchard, Englefield, & Co.*, agents for Messrs. *Boote & Edgar, Manchester.*

Solicitors for the Trustees: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale & Co., Manchester.*

L. JJ. 1875 March 13.

In re GORE LANGTON'S ESTATES.

Lands Clauses Act—Reinvestment in Land—Costs—Funds dealt with in different Branches of the Court—Service of Petition on Incumbrancers.

Two portions of a settled estate had been taken under the *Lands Clauses Act* by different corporations, and the purchase-money had been paid into Court and dealt with by different branches of the Court. It being desired to invest the two funds together in the purchase of land, two petitions were presented. The Court allowed the costs of one only as costs under the Act.

Where a petition is presented simply for the investment in land of money paid into Court under the *Lands Clauses Act*, and there are mortgages or annuities charged upon the estate, the proper course is to serve the mortgagees or annuitants with a copy of the petition and 40*s.* costs, with an intimation that if they appear they will be liable to pay their own costs.

THIS was an appeal from a decision of Vice-Chancellor *Malins.*

In the year 1864 the *Bristol and North Somerset Railway Company* gave notice to treat for certain land in the parish of *Brislington*, near *Bath*, which they were empowered to take under one of their Acts, forming part of the *Gore Langton* estates, of which, under certain settlements, *William Henry Powell Gore Langton* was tenant for life, subject to certain charges, and the company, desiring to take immediate possession, paid the sum of £340 into Court, and gave the usual bond. It was subsequently arranged that the purchase and compensation money should be £100, and a further sum of £60 was paid into Court, and as a title could not

be made, an order for investment of the fund and payment of the dividends to *William Henry Powell Gore Langton* was obtained on petition before Vice-Chancellor *Stuart* on the 20th of November, 1866.

By an indenture of the 3rd of May, 1870, the Corporation of *Bath*, under the powers of "The *Bath Act*, 1870," agreed with *William Henry Powell Gore Langton* to take, for the purpose of improving the supply of water to the city of *Bath*, for the sum of £2500, certain land and easements over other land also forming part of the *Gore Langton* settled estates, but situated in the parish of *Cold Ashton*, and finding that a title could not be made, the corporation paid the money into Court, and an order for investment of the fund and payment of the dividends to *William Henry Powell Gore Langton* was obtained on petition before Vice-Chancellor *Malins* on the 5th of August, 1871.

William Henry Powell Gore Langton died on the 11th of December, 1873, and subsequently *William Stephen Gore Langton*, the present tenant for life of the estates, entered into a contract for the purchase of an estate for £3900, which he desired to add to the settled estates, and towards which he proposed to apply the two funds in Court.

He, accordingly, together with Lady *Anna Gore Langton*, a jointress on the estates, and the representative of a person entitled to a fund of £30,000 charged on the estates, and not completely raised, presented a petition before the Vice-Chancellor *Hall*, as the successor of Vice-Chancellor *Stuart*, for the application of the fund paid into Court by the *Bristol and North Somerset Railway Company* towards the purchase of the property, and another petition before Vice-Chancellor *Malins* for the application in the same way of the fund paid in by the Corporation of *Bath*, it being intended that the remainder of the purchase-money should be provided by the tenant for life.

An order was obtained on the 31st of July, 1874, to transfer the petition before Vice-Chancellor *Hall* to the Court of Vice-Chancellor *Malins*, and both petitions were brought on together.

The estates were subject to two terms vested in trustees, for the purpose of raising two portion funds of £30,000 and £20,000 respectively, small portions only of which had been hitherto raised,

L. JJ. 1875 — *In re* GORE LANGTON'S ESTATES.

and to the payment to *William Henry Gore Langton* of a sum of £13,333, which had also not yet been raised, and the parties representing these funds were made Respondents to both petitions.

The Vice-Chancellor made one order on both petitions for the investment of the funds, but only allowed the costs of one petition, and refused to allow the costs of the trustees of the terms who had been made Respondents (1). From this order the Petitioners appealed.

(1) 1874. Dec. 11. W.N. (1874) 227

SIR R. MALINS, V.C., after referring to the facts, continued:—

It happened that the order for the investment of the money paid by the railway company had been made by a predecessor of Vice-Chancellor *Hall*, and the order for the investment of the corporation money was made by myself. Therefore, it being a rule of the Court that where a matter begins there it is to be continued, it was necessary to apply to the Vice-Chancellor *Hall* as to the one, and to me as to the other, and two petitions were prepared, duly answered, and put into the papers for the same day. Now certainly I must say, considering the small amount in Vice-Chancellor *Hall's* Court, and the large amount here, that the proper course would have been, not to present two petitions, which it was well known would involve the necessity, if there were many Respondents of one set of briefs in one Court and another set in another, and thereby cause very great expense. Now, if one petition had been presented to the Court where the larger fund was, and the Petitioners had stated to me that there was a little irregularity as to asking me to invest the £400, and any one had objected, I should have had it in my power to remove the objection immediately by requesting the counsel to go to the Vice-Chancellor *Hall* for his consent to my dealing with the fund. That might have been done, and would have saved one long petition and the delivery of five briefs. So strongly was this felt by the learned counsel who had the conduct of this Petition, that he asked me to take the Petition from Vice-Chancellor *Hall's* Court, and then applied to the Vice-Chancellor *Hall* for leave to transfer it, and the transfer was made accordingly.

The substance of the order is a matter of course. The two sums are to be applied in part payment of this purchase.

But now comes the question of costs. The first objection is, that it was unnecessary to have two petitions. I think it was not only unnecessary, but improper. Therefore I can allow the costs of one only.

Then it is said that it was very improper to serve the trustees and an uncle of the tenant for life, who had a charge on the estate for £13,333. Considering that all these repurchases of land are made under the direction of this Court, I am of opinion it is quite sufficient to bring the tenant for life before the Court, and it is quite unnecessary to serve either the remainderman or persons who have charges on the estate. That it is not necessary to serve the remainderman, was decided by the Court of Appeal in the case of *Ex parte Staples* (1 D. M. & G. 294), which was a petition by a tenant for life under the *Lands Clauses Consolidation Act* for investment of money in

Mr. *Glasse*, Q.C., and Mr. *Pauli*, for the Petitioners:—

Rule 6 of Cons. Ord. 6 requires that where a fund had been dealt with in one branch of the Court, any subsequent application should also be made there, and this has rendered necessary the presentation of two petitions. It was quite open to the Petitioners to take out one fund only for the purpose of the present purchase, leaving the other to be dealt with in the future in some entirely distinct transaction.

With respect to the service of the petition on the trustees of the portion funds, there has been nothing vexatious or unreasonable in making them Respondents. It has always been the practice to serve parties entitled to charges on the estate, who have a right to see that their security is not diminished: *Re Brooke* (1); *Re Brooke* (2); *In re Duke of Cleveland's Harte Estates* (3); *Re Long's Estate* (4); *Daniell's* Chancery Practice (5); *Ex parte Braye* (6).

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land; and it was decided that the petition need not be served upon the persons entitled in remainder, and, being served, they did not get the costs. It is not necessary to serve a person who gets the whole estate upon the death of the tenant for life, and how can it be necessary to serve a person who has only a charge, when it is perfectly notorious, as here, that the value of the estate greatly exceeds the amount of the charge? These corporations are established to promote objects of public advantage and utility, such, for instance, as supplying the town of *Bath* with water or making a railway; and although they do take the land compulsorily and have to pay the expenses of these petitions, it is due to them to see that they are not put to unnecessary expense in dealing with the fund either on reinvestment or otherwise. The case of *Ex parte Staples* decides that it is not necessary to serve the remainderman. The case of *Re Bowes' Estate* (12 W. R. 929) decides equally clearly that it is not necessary to serve trustees or those who have charges on the estate. The trustees and the person having the charge should either have been made co-Petitioners, which I think is unnecessary, or they should not have been served at all. I think I cannot call on the corporation to pay all the costs. There will be one order on both petitions, but there will be only such costs as there would have been incurred if there had been only one, namely, the costs of the Petition before me, which is the longer of the two. I will give costs of the longer of the two petitions, and no costs of the Respondents, the trustees, or the gentleman having a charge on the estate; and I hope that what has occurred in this case will be a warning to parties that in presenting these petitions they must have some regard to the interests of those who have to pay as well as those who have to receive.

(1) 30 Beav. 233.
(2) 12 W. R. 1128.
(3) 1 Dr. & Sm. 46.
(4) 12 W. R. 460. 10 Jur. N.S. 417.
(5) 5th Ed. p. 1879.
(6) 11 W. R. 333. 9 Jur. N.S. 454

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1875
In re GORE LANGTON'S ESTATES.

Mr. *Ince*, for the Corporation of *Bath*, and Mr. *Kekewich*, for the *Bristol and Somerset Railway Company*:—

There ought in this case to have been only one petition, and both funds being intended to be invested in the same purchase, ought to have been dealt with together. The corporations ought not to be burdened with a double set of costs where one would have served every purpose, and they should not be required to pay the costs of more than one petition: *Ex parte Lord Broke* (1); *Re Browse's Trusts* (2); *Re Bilston Curacy* (3).

It was also quite unnecessary to make the trustees of the terms Respondents. The tenant for life fully represents the estate for the purpose of investment of the fund in land: *Ex parte Staples* (4). That case decided the point as to remaindermen; and the same principle applies to trustees of terms for portions or other purposes: *Re Bowes' Estate* (5). Where the petition was for payment of the income to the tenant for life, Lord *Hatherley*, when Vice-Chancellor, directed that the incumbrancers need not be served: *In re Hungerford's Trust* (6).

Mr. *Glasse*, in reply.

SIR W. M. JAMES, L.J.:—

With regard to the first point, I am of opinion that it is really within the discretion of the Vice-Chancellor whether costs had been unnecessarily and improperly incurred. The Vice-Chancellor was of opinion that in the circumstances of this particular case they had been so incurred, and I agree with his conclusion. I do not say that the course taken was taken with a view to increase costs; but suitors sometimes forget to consider what expense may be caused by their course of proceeding.

On the other point also I think that the Vice-Chancellor was right in principle when he ordered the Petitioners to pay the costs of the incumbrancers, but the established practice of the Court seems to have been that mortgagees should be served with petitions of this nature; and therefore I think that, having regard to that

(1) 11 W. R. 505.
(2) 14 Ibid. 298.
(3) 10 Ibid. 516.
(4) 1 D. M. & G. 294.
(5) 12 W. R. 929.
(6) 3 K. & J. 455.

practice, and the rule laid down in text-books, we ought not, *rebus sic stantibus*, to make the Petitioners pay the costs in this case. But for the future, for the benefit of railway companies and other public bodies paying money into Court, I desire to follow the precedent laid down by Lord *Hatherley*, when Vice-Chancellor, in *Re Hungerford's Trusts* (1). In the future, therefore, this wholesome rule may fairly be laid down, that whenever there is a petition simply for the reinvestment of money in land, and there are mortgagees or annuitants whose rights are not otherwise affected by the petition, the proper course will be to serve such mortgagees or annuitants with a copy of the petition, and to pay them 40*s.* for costs, giving them at the same time an intimation that if they appear upon the hearing they will probably have to pay their own costs. But this rule never having been hitherto laid down, we cannot make the Petitioners pay the costs in this case, and the Vice-Chancellor's order must be varied by directing the costs of the trustees to be paid by the company and the corporation in the same way as was done in *Ex parte Bishop of London* (2).

SIR G. MELLISH, L.J., concurred.

Solicitors for the Petitioners: Messrs. *A. F. & R. W. Tweedie*, agents for Messrs. *Maule & Robertson, Bath.*

Solicitors for the Respondents: Messrs. *Clarke, Woodcock, & Ryland;* Messrs. *Frere & Co.*

(1) 3 K. & J. 455. 1 Jur. N.S. 845. (2) 2 D. F. & J. 14. 6 Jur. N.S. 640

L. JJ.
1875
March 15.

KREHL *v.* PARK.

[1869 K. 40.]

Costs, Appeal for—Inquiry—Costs given generally by Decree, not Reserving further Consideration—Subsequent Costs.

By a decretal order specific performance was decreed against a vendor; an inquiry was directed what damage had been sustained by the Plaintiffs by reason of the acts complained of in the bill, and the Defendant was ordered to pay the costs of suit; liberty to apply being given, but further consideration not being reserved. The acts complained of by the bill were—commencing to pull down buildings and removing the materials, and cutting and carrying away the crops on the land. The Plaintiff carried in a very large claim for damages under various heads, most of which were at once rejected in Chambers, but a certificate was made (which Vice-Chancellor *Bacon* refused to vary) giving damages for pulling down buildings, and also under four other heads. The Lords Justices, on appeal, held that no damage was shewn, on the ground that, under the peculiar circumstances, pulling down the buildings caused no damage, and that the other heads of damage were not within the scope of the inquiry. The Defendant subsequently applied for the costs of the inquiry, on the ground that it had resulted wholly in his favour. This application having been refused by Vice-Chancellor *Bacon*:—

Held, on appeal, that the Plaintiff, though unsuccessful, was entitled to the costs of the inquiry so far as they related to pulling down buildings, removing materials, and cutting and carrying away crops; but must pay all the other costs of the inquiry.

THIS was an appeal by the Defendant from a decision of Vice-Chancellor *Bacon* refusing an application to order the Plaintiffs to pay the costs of an inquiry.

In 1867 the Defendant *Park* entered into two written agreements to sell to *Benjamin Higgs* two properties at *Teddington*. *Higgs* entered into possession and commenced erecting on one of the properties a very large mansion in a most extravagant way. On the 3rd of March, 1869, *Higgs* informed the Defendant that he, *Higgs*, had lost money and could not complete the contracts, and requested the Defendant to rescind them, which the Defendant agreed to do, and on the following day an agreement rescinding the contracts, and also embracing some other matters, was signed. *Park* thereupon resumed possession. The walls of the mansion were at this time only a little above the ground, but

some outbuildings were in a tolerably complete state. It appeared that about £13,000 had been spent, and that at least £20,000 more would be required to complete the buildings. On the 5th of March *Higgs* absconded, and some weeks afterwards was adjudicated bankrupt; and on the 16th of June, 1869, assignees were appointed. In July, 1869, the assignees filed their bill to set aside the agreement of the 4th of March, and for specific performance of the agreements for sale, and for an injunction to restrain *Park* from pulling down, injuring, or altering the buildings, and from removing any of the materials or the fixtures or fittings. The Defendant gave up possession to the Plaintiffs in September, 1869, and on the 3rd of November, 1869, he not opposing, an order was made setting aside the agreement of the 4th of March, directing specific performance of the agreements for sale, ordering an injunction as prayed, directing an inquiry whether any and what damage had been sustained by the Plaintiffs by reason of the acts of the Defendant complained of in the Plaintiffs' bill, and ordering the Defendant to pay the costs of the suit; liberty to apply being given, but further consideration not being adjourned.

The acts complained of in the bill were mentioned in par. 20: "The Defendant is now in possession of the said premises comprised in the said agreement of the 4th of March, 1869, and has commenced pulling down the buildings thereon and removing the materials thereof, and cutting and carrying away the crops of hay, fruit, and vegetables thereon."

The Plaintiffs carried in a claim for damages under various heads to the amount of about £13,000. The Chief Clerk at once disallowed the bulk of the items, but on the 22nd of May, 1873, made his certificate, assessing the damages at £1425 10*s.* 8*d.*, made up as follows:—

	£	*s.*	*d.*
1. Damage to vines, lawn, and garden, through not being attended to . .	20	0	0
2. Pulling down buildings . . .	440	0	0
3. Costs under *Higgs's* bankruptcy . .	58	8	2
4. Occupation rent	166	5	0
5. Interest allowed Defendant on balance of purchase-money from time of payment into Court	740	17	6

L. JJ. 1875 KREHL v. PARE.

The Defendant took out a summons to vary the certificate. This summons, having been adjourned into Court, was dismissed with costs by Vice-Chancellor *Bacon*. The Defendant appealed, and the Lords Justices, on the 5th of March, 1874, disallowed all the above items: as to items 1 and 4, on the ground that the decree did not extend to permissive waste or to occupation rent; as to item 2, on the ground that for the purposes of sale, for which only the assignees wanted it, the property was not deteriorated by pulling down the useless buildings of *Higgs;* as to item 3, that these costs were merely preliminary costs of preparing for litigation, and not damages of the nature contemplated by the decree; and as to item 5, that the deduction of this interest was in no way within the decree, and, moreover, was not founded on any principle. The inquiry, therefore, resulted in there being no damages.

On the 21st of January, 1875, the Defendant moved before Vice-Chancellor *Bacon* for an order upon the Plaintiff to pay the costs of the inquiry as to damages. Vice-Chancellor *Bacon* refused the motion without costs, and it was now renewed before the Court of Appeal.

Mr. *Swanston*, Q.C., and Mr *Dauney*, for the Appellant:—

This does not come within the rule that there cannot be an appeal as to costs, for a question of principle is involved. The Vice-Chancellor did not exercise any discretion as to these costs, but put the matter on two grounds: first, that the case had been before the Lords Justices; and, secondly, that there might be some future application on which costs could be dealt with, but that they could not be dealt with under liberty to apply. As to the first point, nothing was before the Lords Justices on the last occasion but a summons to vary the certificate, and that could not give jurisdiction to deal with the costs of the inquiry. As to the other point, we say that *Viney* v. *Chaplin* (1) is in our favour, and that *Quarrell* v. *Beckford* (2) and *Kendall* v. *Marsters* (3), which were relied on by the other side, do not decide anything against us. The case is one where an inquiry as to damages has been carried on at great expense, and nothing is found due; the unsuccessful party ought, therefore, to pay the costs.

(1) 3 De G. & J. 282. (2) 1 Madd. 269.
(3) 2 D. F. & J. 200.

Mr. *Kay*, Q.C., and Mr. *Shebbeare*, for the Plaintiffs:—

In *Quarrell* v. *Beckford* the decree was treated as conclusive so far as it provided for costs generally, though further consideration was reserved; and it is clear that where a decree gives costs generally, and no further consideration is reserved, the subsequent costs are included.

[The LORD JUSTICE JAMES:—However improperly incurred?]

If it be necessary to go so far, we say that the Court has no jurisdiction over them. The parties choose to take a decree in this form by consent, without any reservation of further consideration, and the Defendant's bargain is to pay the costs of the inquiry, however it may turn out. "Where costs are given by the decree at the hearing, the subsequent costs will be included": *Daniell's* Chancery Practice (1). This is substantially an application to vary the decree under the liberty to apply.

Mr. *Swanston*, in reply:—

The order was not opposed, but was not a consent order, so no objection to the jurisdiction can be founded on that ground.

SIR W. M. JAMES, L.J.:—

I am of opinion that the counsel for the Respondents, the Plaintiffs in the suit, are well founded in saying that, according to the well-established practice of this Court, the costs of suit when given to a party are not confined to the costs of suit up to the hearing, but include the costs of all accounts and inquiries requisite for carrying out the decree: nor are these latter costs costs for subsequent consideration. That is the general rule, and it is very important that that general rule should not be interfered with. But there is also another general principle which is of no less importance to suitors, namely, that this Court has jurisdiction over every order and every decree that it makes, whether with regard to costs or otherwise, and will see that an order is not abused so as to be the cause of oppression to the adverse litigant. I am of opinion that in this case the order giving the costs of the suit to the Plaintiffs has been abused, so as to tend to the oppression of

(1) 4th Ed. p. 1251.

L. JJ. 1875 KREHL v. PARK.

the Defendant, and therefore I think the Defendant is entitled to an order, although not to the whole extent of the order for which Mr. *Swanston* on his behalf has asked. The inquiry directed by the original order (which must for this purpose be treated as a decree, whether it was so in form or not) was as to the damage, if any, sustained by reason of the acts complained of in the bill, and that was the sole subject-matter of the inquiry. On a former occasion, on the hearing of the appeal on the summons to vary the Chief Clerk's certificate, we laid down as the true construction of that part of the order, that the acts complained of were the acts mentioned in the 20th paragraph of the bill, that is to say, the commencing pulling down the buildings, removing the materials, and cutting and carrying away the crops of hay, fruit, and vegetables; and the inquiry ought to have been treated as confined to those acts and the damage resulting from those acts. In the result we found, differing in that respect from the Vice-Chancellor, that no damage whatever had been sustained, even with regard to those acts; and we found, differing from him, that other subjects of damage were not within the inquiry.

That being so, I am of opinion that, according to the true meaning of the order, the Plaintiffs are entitled to all the costs of the inquiry so far as they properly relate to the pulling down of the buildings, removing the materials, and cutting and carrying away the crops of hay, fruit, and vegetables, but that everything which the Plaintiffs have attempted to charge against the Defendant in respect of any other matters, was improperly introduced under colour of the order—was an extension of the order beyond its true intent and meaning, and was the commencement of a new litigation in Chambers, which has utterly failed. I am of opinion, therefore, that all the costs of the inquiry, except the costs of the matters which I have mentioned as included in the order, ought to be paid by the Plaintiffs to the Defendant; the Plaintiffs, according to my view, being still entitled under the order to the costs properly incurred by them in respect of the three subject-matters to which I have referred. The true meaning of the order is not that the Defendant was to pay the costs if damage should result, but the inquiry was to be at the cost of the Defendant, and if that had been properly and fairly and reasonably carried out,

the Plaintiffs would have had the whole of the costs of the inquiry, according to the general practice of the Court, although it resulted in finding nothing to be due in respect of damages.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The rule which appears to be established is, that where costs of suit are given generally by the decree at the hearing, the subsequent costs of working out the directions of the decree will be included. I am of opinion that no distinction can be made between a decree and a decretal order of this kind by which the costs of the suit generally are given, and, according to the case of *Quarrell* v. *Beckford* (1), it appears to make no difference that one of the inquiries so far turns out frivolous that no damages are given to the Plaintiffs in respect of it. I am therefore of opinion that the Plaintiffs are entitled to so much of the costs as were properly incurred in carrying out, or endeavouring to carry out, the inquiry directed by the decretal order. On the other hand, if the party puts a wrong construction on the decree which he has obtained, and brings into Chambers a claim in respect of matters which, according to the true construction of the decree, he is not entitled to have inquired into, it would be an extraordinary thing if this Court had no power to deal with the costs so incurred; and no doubt on general principles the Court must be entitled to say that the party who has wrongfully incurred and occasioned costs, who has brought forward entirely fresh claims which are not within the decree, is not only not entitled to receive, but may be ordered to pay, the costs of that fresh litigation. The proper order will be that the Defendant is to pay the costs of the inquiry properly incurred so far as they relate to pulling down the buildings, removing the materials, and carrying away the hay and crops, and the Plaintiffs are to pay all the other costs of the inquiry. There will be no costs of the appeal, but the Defendants will have the costs of the motion in the Court below.

Solicitors: Messrs. *H. F. & E. Chester*; Mr. *W. Eley*.

(1) 1 Madd. 269.

L. JJ.
1875
March 22.

VALE *v.* OPPERT.

[1873 V. 2.]

Practice—Production of Documents—Solicitor's Lien.

W.D. 144

A Defendant, shortly after filing an affidavit as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solicitors. The Plaintiff applied for production of the documents, which the Defendant resisted on the ground that they were in the possession of his former solicitors, who claimed a lien on them:—

Held (affirming the decision of *Bacon*, V.C.), that an order for production must be made, with liberty to apply in case the Defendant found it impossible to produce the documents, the Plaintiff not to attach the Defendant without leave of the Court.

Per James, L.J.:—A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the cause to production.

THIS was a motion by the Defendant by way of appeal from an order of Vice-Chancellor *Bacon* for the production of documents.

The bill was filed on the 9th of January, 1873, for the dissolution and winding-up of a syndicate or partnership for working certain mines in *Ireland* of which the Defendant *Oppert* had been treasurer. On the 3rd of April, 1873, *Oppert* filed the usual affidavit as to documents. At that time Messrs. *Elmslie, Forsyth, & Sedgwick* were his solicitors. In the same month *Oppert* took proceedings under the *Bankruptcy Act* for liquidation of his affairs, and a resolution was duly passed for their being liquidated by arrangement. *McLean* was appointed trustee.

On the 15th of May, 1874, *Oppert* obtained the usual order to change his solicitors.

On the 26th of January, 1875, the Plaintiff took out a summons for the production of the documents mentioned in the first part of the schedule to the affidavit of the 3rd of April, 1873, except such of them as *McLean* had by affidavit filed on the 21st of January, 1875, admitted to be in his possession as trustee. On the 2nd of February *Oppert* filed, in opposition, an affidavit as follows:—

"At or immediately prior to deposing to my affidavit as to documents filed in this cause on 3rd April, 1873, I handed over to Messrs. *Elmslie & Co.*, who acted for me as my solicitors in this

cause until 15th May, 1874, all the papers and documents mentioned in the schedule to my said affidavit, with the exception of such of the said documents as are included in the schedule to the affidavit of the Defendant, *R. McLean*, my trustee, filed in this cause on 21st January, 1875.

"I have not now, nor have I since the said 3rd day of April, 1873, had in my possession, custody, or power, or in that of my present solicitors, any of the papers or documents so included in the schedule to my said affidavit filed on the 3rd of April, 1873, as aforesaid; but the same are, I believe, still in the possession, custody, or power of either the said Messrs. *Elmslie & Co.*, or of the said Defendant, *R. McLean*, as my trustee as aforesaid."

The managing clerk of the Plaintiff's solicitors deposed that Messrs. *Elmslie & Co.* had at first refused to allow inspection of the documents in their possession, but had afterwards withdrawn this refusal and produced certain documents, being only a small part of those required, stating at the same time that they had no others.

Oppert deposed that Messrs. *Elmslie & Co.* claimed a lien upon the documents.

The summons was adjourned into Court, and Vice-Chancellor *Bacon* made an order on *Oppert* for production, as asked by the summons.

Mr. *E. Cutler*, for the appeal motion, referred to *Palmer* v. *Wright* (1); *North* v. *Huber* (2); *Re Williams* (3).

Mr. *Locock Webb*, for *Oppert*:—

If documents are in the possession of a solicitor who claims a lien, the party may be ordered to produce them, and if he cannot produce them without paying the solicitor's bill, he must do so: *Ex parte Shaw* (4).

[The LORD JUSTICE JAMES:—That, no doubt, is the general rule; but may not the case of a party who has become bankrupt and is unable to pay anything be an exception?]

(1) 10 Beav. 234.
(2) 7 Jur. (N.S.) 767.
(3) 7 Jur. (N.S.) 323.
(4) Jac. 270.

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The evidence does not clearly shew that *Oppert* cannot get the documents. In *Palmer* v. *Wright* (1) the papers were not in the possession of the Defendant's solicitor, but of the solicitor of his testator; in *North* v. *Huber* (2), in the possession of an auctioneer, who claimed a lien; and in *Re Williams* (3), in the possession of another party. The decision in *Rodick* v. *Gandell* (4) is precisely in point in the present case.

Mr. *Cutler*, in reply, referred to *Liddell* v. *Norton* (5).

SIR W. M. JAMES, L.J.:—

I think that the order of the Vice-Chancellor must be affirmed. If an order for production were refused, we should be enabling Defendants to resort to the device of delivering documents to their solicitor, changing him, and then refusing production on the ground that they were unable to pay his bill. That is a device which the Court cannot encourage. The order of the Vice-Chancellor must stand, but the Defendant must have liberty to apply if it turns out that he really cannot get the documents produced. He will not, however, be excused on the ground of his making a mere formal application to Messrs. *Elmslie & Co.*, as if he did not care whether he got them or not; he must satisfy the Court that he has done his best to comply with the order: and the Plaintiff must not issue an attachment without the leave of the Court.

SIR G. MELLISH, L.J., concurred.

SIR W. M. JAMES, L.J.:—Messrs. *Elmslie & Co.* are not likely to refuse production on the ground of their lien, for a solicitor has no right to set up a lien acquired in the cause against the rights of the other parties in the cause to production.

Solicitors: Messrs. *Vallance & Vallance;* Messrs. *Lawrance, Plews, & Co.*

(1) 10 Beav. 234.
(2) 7 Jur. (N.S.) 767.
(3) 7 Jur. (N.S.) 323.
(4) 10 Beav. 270.
(5) Kay, App. xi.

FOWKES *v.* PASCOE.

L. JJ.
1875
March 3, 10, 11, 24.

[1873 F. 35.]

Purchase in Joint Names—Gift—Resulting Trust—Evidence—Presumption—Ademption.

A testatrix, both before and after she made her will, purchased sums of stock in the names of herself and the son of her daughter-in-law. By her will she gave the residue of her estate to her daughter-in-law for life, and after her death to the son and the daughter of the daughter-in-law:—

Held, that, under the circumstances, the sums of stock so purchased were a gift to the son of the daughter-in-law:

Held, that in such a case the evidence of the son and his wife was admissible, and could not be disregarded as rebutting the presumption of a resulting trust; and that, coupled with the circumstances under which the stock was purchased, it was sufficient to rebut the presumption:

Held, on the facts, that the testatrix had not placed herself *in loco parentis* to the son of her daughter-in-law or to the other residuary legatee, and that both these facts would have to be proved to make the gift an ademption of the residuary bequest.

Decision of the Master of the Rolls reversed.

SARAH BAKER, the testatrix in this cause, had one child only, a son, who had died, leaving a widow. The widow of the son married again, and was then called *Elizabeth Ann Pascoe*. She had by her second husband several children, of whom two only, *John Irving Pascoe* and *Mary Ann Pascoe* (afterwards *Mary Ann Heritage*), survived *Sarah Baker*.

Sarah Baker, by her will, dated the 9th of November, 1843, devised certain real estate to *John Irving Pascoe*. She then devised and bequeathed her leaseholds and personalty and the residue of her realty to trustees, one of whom was *John Irving Pascoe*, upon trust to convert the same and to invest the proceeds, and out of the income of the investments to pay certain life annuities, and subject thereto to pay the income to *Elizabeth Ann Pascoe* for her life; and the testatrix directed her trustees to divide the principal, after the death of *Elizabeth Ann Pascoe*, between such of the children of *Elizabeth Ann Pascoe* as should attain the age of twenty-one years. The testatrix further directed that £100 a year should, during the life of *Elizabeth Ann Pascoe*, be paid

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to such of her daughters as had attained the age of twenty-one years.

On the 2nd of March, 1843, *Sarah Baker* had bought £250 3½ per Cent. Reduced Annuities, afterwards 3¼ per Cent. Annuities, in the names of herself and one *Mary Clapham*, who resided with her; and had bought £250 3½ per Cent. Reduced Annuities in the names of herself and *John Irving Pascoe*. On the 29th of August, 1845, *Sarah Baker* bought two further sums of £250 like annuities in the names of herself and *John Irving Pascoe*. From time to time *Sarah Baker* bought further sums of like annuities in the names of herself and *John Irving Pascoe*, till the sum amounted to £2000 3¼ per Cent. Annuities. On the 15th of August, 1848, *Sarah Baker* transferred £4000 3¼ per Cent. Annuities into the names of herself and *John Irving Pascoe;* and a short time before her death she bought a further sum of £1000, making the total sum standing in the names of herself and *John Irving Pascoe* £7000.

On the 3rd of December, 1850, *Sarah Baker* died; and soon afterwards *John Irving Pascoe* caused the £7000 to be transferred to his own name.

Elizabeth Ann Pascoe died on the 12th of March, 1872; and thereupon *John Irving Pascoe* and the trustees of the settlement made on the marriage of *Mary Ann Heritage*, the other surviving child of *Elizabeth Ann Pascoe*, as assignees from *Mary Ann Heritage*, became entitled to the residuary estate of the testatrix *Sarah Baker*.

The trustees of the settlement filed a bill against *John Irving Pascoe* and his co-trustee under *Sarah Baker's* will for the administration of the estate of *Sarah Baker*. The principal object of the suit was, however, to determine whether *John Irving Pascoe* was entitled to the £7000 3¼ per Cent. Annuities which he claimed as a gift. He also claimed the dividend, due at the death of the testatrix, on the £6000 3¼ per Cent. Annuities.

John Irving Pascoe deposed that the £7000 was intended as a gift to him; and his evidence was supported by that of his wife and of two servants. The further facts of the case and the evidence are fully stated in the judgment of Lord Justice *James*.

The Master of the Rolls was of opinion that Mr. *Pascoe* was

trustee of the £7000 for Mrs. *Baker*, and made a decree for the administration of the estate of Mrs. *Baker*, adding to it a declaration as to the trust of the £7000 (1).

Mr. *Pascoe* appealed against the decree so far as related to the declaration.

Mr. *Chitty*, Q.C., and Mr. *W. H. Thompson*, for the Appellant:—

No doubt when you find a man investing in the names of himself and another, the presumption is that there is a resulting trust

(1) 1874. Nov. 17. WM 874 203. SIR G. JESSEL, M.R., after stating the facts of the case, said that there was no presumption in favour of a gift, as Mr. *Pascoe* did not attempt to say that he was an adopted son of the testatrix.

His Honour did not understand that the law of this Court made any difference between a transfer and a purchase —a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner in the joint names of himself or herself, or a transfer to a third name from the beneficial owner into another name. In either case, in the absence of evidence to the contrary, there was a resulting trust in favour of the beneficial owner. That being so, if there was no evidence and no case of adoption, or putting herself in the position of a parent, it would follow that this property remained the property of Mrs. *Baker*; therefore the only two questions to be considered were, first, whether there was any case of *quasi* parentage raised, because if not raised by the answer the evidence need not be considered; and, secondly, if such a case was not made out, whether there was a case of clear gift. It must be shewn to be a clear gift, because persons in intimate relations with aged ladies not blood relations, not having actual claims on their bounty by reason of any act done by the aged person in question to make it a moral duty on her to provide for them, must shew by clear evidence that when she parted with her property she intended to give it out and out after her own decease. That is not only a rule of law, but a rule founded on sound policy and good sense. Those that allege that other people, especially in this position, give them large sums of money, must prove it, and prove to the satisfaction of a Court of Justice that they are entitled to that sum of money. His Honour then commented on the answer and the evidence, and said that no case of adoption was either set up or proved. Nor was there evidence of an expressed intention to make a clear gift. The only evidence was that of Mr. *Pascoe* and his wife. The evidence of a wife was not equal to that of a second witness, as no doubt the husband and wife had talked it over, and she might be led to believe that what the husband told her was a fact. This evidence standing alone was not sufficient to make the Court impute to the testatrix an intention of giving this property to Mr. *Pascoe*. Upon the whole, His Honour was of opinion that Mr. *Pascoe* must be treated as trustee of the whole sum of £7000 3¼ per Cent. Annuities.

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for himself; but that presumption may easily be rebutted: *Dyer* v. *Dyer* (1); *Rider* v. *Kidder* (2); especially when the person who invested stood *in loco parentis* to the other: *Powys* v. *Mansfield* (3); *Dummer* v. *Pitcher* (4). Actual relationship is not necessary: *Sayre* v. *Hughes* (5); *Currant* v. *Jago* (6). We do not, however, say that Mrs. *Baker* had actually adopted Mr. *Pascoe* as her son, but she had so much regard and affection for him as to make the gift not at all improbable: *Nicholson* v. *Mulligan* (7). All the evidence is on our side; there is none against us: *In re Curteis's Trusts* (8); *George* v. *Howard* (9).

Mr. *Southgate*, Q.C., Mr. *Waller*, Q.C., and Mr. *Davey*, for the Plaintiffs:—

If the testatrix intended to give so large a sum, can it be believed that she would not have said more about it? With the exception of *George* v. *Howard*, there is no authority for the distinction between a stranger and a relation in the case of an alleged gift. Where a person invests money in the name of himself and another, the presumption is that the other person is merely a trustee; and there is not evidence enough in this case to rebut that presumption.

Even if the £7000 is held to be a gift, it must be taken as an ademption of the share given by the will: *Pym* v. *Lockyer* (10); and the mere circumstance of there being no relationship between the parties will not alter the case. *Montefiore* v. *Guedalla* (11), *Dawson* v. *Dawson* (12), *Cooper* v. *Macdonald* (13), *Leighton* v. *Leighton* (14), and *Meinertzagen* v. *Walters* (15), shew what the principles are. On the evidence it is clear that Mrs. *Baker* put herself *in loco parentis* to Mr. *Pascoe*, and therefore all the gifts made after the date of the will are in the nature of an advancement, which he must bring into hotchpot. If Mrs. *Baker* did not

(1) 2 Cox, 92.
(2) 10 Ves. 360.
(3) 3 My. & Cr. 359.
(4) 2 My. & K. 262.
(5) Law Rep. 5 Eq. 376.
(6) 1 Coll. 261.
(7) 3 Ir. Rep. Eq. 308.
(8) Law Rep. 14 Eq. 217.
(9) 7 Price, 646.
(10) 5 My. & Cr. 29.
(11) 1 D. F. & J. 93.
(12) Law Rep. 4 Eq. 564.
(13) Ibid. 16 Eq. 258.
(14) Ibid. 18 Eq. 458.
(15) Law Rep. 7 Ch. 670.

stand *in loco parentis*, then the presumption of law against the money being intended as a gift is still stronger.

Mr. *Chitty*, in reply.

March 25. SIR W. M. JAMES, L.J.:—

The case of the Plaintiffs is simply this: Certain sums of stock have been discovered to have been standing in the joint names of a lady deceased and the Defendant *John Irving Pascoe*. They were partly purchased with the lady's money, partly transferred from her name to the joint names. This, it is alleged, proves a resulting trust for the lady. And it is further alleged that the onus of rebutting the presumption of resulting trust is on the Defendant, and that he has failed to discharge himself. The Master of the Rolls was of that opinion, hence this appeal.

The relations between the lady and the Defendant were of a character very natural, but singular in this respect, that nothing like them appears to have occurred in any of the reported cases.

Mrs. *Baker* was a widow lady of considerable property. She was, at the time of the transactions in question, childless, but she had had an only son, who had left a childless widow. The younger widow lived with her father-in-law and mother-in-law, and after the death of the father-in-law, with the latter, whose home was her home, until she found a second husband, whom she married from that home. This marriage does not appear to have diminished the feelings of maternal and filial affection between the mother-in-law and the daughter-in-law. Everything in the case shews that the mother-in-law looked upon her daughter-in-law, her children, and grandchildren as if they had been her own descendants, the issue of her own body. There was, amongst other issue of the second marriage, a son, the Defendant, and two daughters, one deceased, the other *Mary Ann Heritage*, whose trustees are the present Plaintiffs. The son, when a youth, and for some years from and up to his marriage, lived with Mrs. *Baker*. In course of time, that is to say, in the year 1844, he married and had children. He resided after his marriage near *Birmingham*,

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but whenever he came to *London* he made his abode in Mrs. *Baker's* house. His children were actually brought from *Birmingham* to *London* to her house to be baptized from there at her church, and by her clergyman, and the likenesses of the little ones were the favourite ornaments of her room. [His Lordship read the evidence on this subject.] She made her will in the year 1843. By that will she gave certain real property to the Defendant, and the residue of her property, which was large, she gave to her daughter-in-law for life, charged with annuities for the daughters, and after her death it was to go to the children of the daughter-in-law.

This, then, was the relationship between the parties when the facts happened from which the present suit has arisen. [His Lordship then stated the manner in which the purchases and transfer had been made.] Of these sums, amounting to £7000, the Defendant has been declared to be a trustee for the estate of Mrs. *Baker*.

I will assume, for the present purpose, that the origin and nature of the relations between the parties did not affect the legal presumption of resulting trust. I will assume, further, that the implication of a resulting trust does arise as much in the case of a transfer as in that of a purchase of stock, although that certainly is not the case with regard to a conveyance of land; and I will proceed to consider how the evidence stands on these assumptions. To my mind, differing in this respect altogether from the Master of the Rolls, the evidence in favour of gift and against trust is absolutely conclusive. There is, to begin with, in respect of the two first purchases, an inference from the facts themselves which is, to my mind, irresistible. Whatever may be the presumption as to one purchase or one transfer standing by itself, the fact of the contemporaneous purchases of small distinct sums in different names, —in the name of a *quasi* son or grandson, and of a companion, and the subsequent repetition of those purchases, is not to be got over. The lady had £500 to invest; she had already large sums of stock standing in her own name, besides other considerable property. Is it possible to reconcile with mental sanity the theory that she put £250 into the names of herself and her companion, and £250 into the names of herself and Defendant, as

trustees upon trust for herself? What trust—what object is there conceivable in doing this? If this case were tried before a jury, no Judge could withdraw the facts of the contemporaneous purchases and of their repetition from the consideration of a jury, and, in my opinion, no jury would or could be found who would hesitate to say that the thing was done by way of gift and not trust.

Starting with this, that the original purchase was gift and not trust, it appears to follow that the subsequent additions must be of the same nature; and the piecemeal nature of these additions is pregnant with the same inference. But the case is far from resting here. The Defendant swears positively to their having been gifts, and although I concur in what the Master of the Rolls has said, and although this Court has more than once said that it is too dangerous to rely on the mere evidence of a party interested as to conversations with a deceased person, yet it is legally admissible evidence, and is not to be disregarded when adduced by a man in support of his claim to that which is indisputably his at law, and which an attempt is made to deprive him of. Where the Court of Chancery is asked, on an equitable assumption or presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say: "Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances." The evidence is to be weighed, of course, with reference to that danger, but still is to be weighed like every other piece of evidence, together with every other fact and inference in the case.

[His Lordship then stated and commented on the evidence of *John Irving Pascoe* and of his wife, observing that his story was highly probable and credible, and coming to the conclusion that if the onus was on the Defendant he had proved his case.]

It was, however, contended that if, under the circumstances, the theory of gift would prevail, the same circumstances and evidence would shew that the gift was so made as to be an ademption or partial satisfaction of the share of the residue to which the Defendant was entitled under the will. And if one were permitted to guess—if one were permitted to ask on any instinctive feeling of what probably was the testatrix's intention, that is probably the result which the Court would arrive at.

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But is it possible, consistently with established rules, to arrive at that result? In the first place, no parol evidence of such an intention is admissible, for such parol evidence would be to alter the written will. That effect if produced at all must be produced by operation of law. The rule of law is that legacies given by a father, or a person *in loco parentis*, are or may be adeemed by gifts between the will and the death. The principle is that the will shews the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, or going out to establish himself in the world, or the like, it is to be presumed, as a *presumptio juris et de jure*, that the advancement is an anticipation of the testamentary provision, just as under the *Statute of Distributions* an advancement is to be brought into hotchpot. But this presumption applies only to fathers, or persons who have put themselves *in loco parentis*. What in any particular case is putting oneself *in loco parentis*, is probably one of the most difficult of legal problems to solve. It used to be laid down in the treatises that nothing short of assuming the whole functions and duties of the father would do, and in particular that such a character could not be predicated where the child was actually living with her own father and maintained by him, and could not be predicated even between a grandfather and grandson if the father were alive. But in the case of *Pym* v. *Lockyer* (1), before Lord *Cottenham*, that rule was certainly not acted on to the full extent. [His Lordship then read the facts of the case in *Pym* v. *Lockyer*.] That case went beyond the former rule, but even that case must be considerably extended in order to meet the case before us. In that case the grandfather had directed and controlled the children, had been referred to on the treaties for their marriages, and had provided marriage portions for them. Nothing of the kind took place in this case. There are very strong expressions about adoption, proved by the Defendant himself, but it does not appear that Mrs. *Baker* ever did provide, or had occasion to provide, for the maintenance, education, marriage portion, or setting out in the world of the children of her daughter-in-law, except that the son did live with her a few years before

(1) 5 My. & Cr. 29.

his marriage, and had a handsome present on his marriage. What she did was, that, having no nearer or dearer object of her testamentary bounty, she selected her daughter-in-law and the children of her daughter-in-law to be her heirs, and all her expressions and her conduct are to be explained by and referred to her adoption of the family in that sense.

On full consideration, I am satisfied that such conduct is far from bringing this case within the rule as to ademption or satisfaction of legacies, and that if we extend the rule to this case we cannot stop short of applying it to every case of gifts made after the will to one of a family selected as the residuary legatees of a testator. It may be further observed that the case of *Montefiore* v. *Guedalla* (1) was the first case in which the doctrine of ademption or satisfaction was applied to residuary legatees; and in the case of *Meinertzagen* v. *Walters* (2) we came to the conclusion that it could only be applied between children against a child in favour of a child, not in favour of a stranger. It would, therefore, be necessary in this case to shew, not only that the testatrix had placed herself *in loco parentis* to the Defendant, but to his sister, of which there is no trace.

The result is that the Master of the Rolls' order, so far as regards the capital, must be discharged. The Defendant is clearly liable to account for the dividends due in the testatrix's lifetime, and afterwards received by him. He swears, indeed, that it was intended that he should receive whatever was not received by her in her lifetime. It is impossible to place any reliance on this. It was obviously the intent and meaning of the transactions in this case (as it may be taken to be universally in like gifts) that the donor should receive the income during her life, and the accident that a dividend was in arrear at her death could not make any difference as to the equitable right.

The decree of the Master of the Rolls, so far as regards the declaration as to the trust of the £7000, must be discharged.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. I should not have thought

(1) 1 D. F. & J. 93. (2) Law Rep. 7 Ch. 670.

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it necessary to add anything to what has been said by the Lord Justice, with which I entirely agree, except that, on account of the great respect I have for the judgment of the Master of the Rolls, I wish to say something on the principle on which His Honour decided this case.

There can be no doubt that the question in this case is a question of fact. It cannot be decided simply on the ground of legal presumption, because whatever effect is given to the evidence of Mr. *Pascoe* and his wife, their evidence is evidence to rebut the presumption, and therefore the Court must consider whether the presumption is rebutted or not.

Now, the Master of the Rolls appears to have thought that because the presumption that it was a trust and not a gift must prevail if there were no evidence to rebut the presumption, therefore when there was evidence to rebut the presumption he ought not to consider the probability or improbability of the circumstances of the case, and whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of *Pascoe* and his wife taken alone was not satisfactory. But, in my opinion, when there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption.

Now, the presumption must, beyond all question, be of very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, if there was no evidence at all, would compel the

Court to say that the presumption of trust must prevail, even if the Court might not believe that the fact was in accordance with the presumption, yet, if there is evidence to rebut the presumption, then, in my opinion, the Court must go into the actual facts. And if we are to go into the actual facts, and look at the circumstances of this investment, it appears to me utterly impossible, as the Lord Justice has said, to come to any other conclusion than that the first investment was made for the purpose of gift and not for the purpose of trust. It was either for the purpose of trust or else for the purpose of gift; and therefore any evidence which shews it was not for the purpose of trust is evidence to shew that it was for the purpose of gift. We find a lady of considerable fortune, having no nearer connections than Mr. *Pascoe*, who was then a young man living in her house, and for whom she was providing. We find her, manifestly out of her savings, buying a sum of £250 stock in the joint names of herself and him, and at the same time buying another sum of £250 stock, on the very same day, in the joint names of herself and a lady who was living with her as a companion. Then, applying one's common sense to that transaction, what inference is it possible to draw, except that the purchases were intended for the purpose of gifts? If they were intended for the purpose of trusts, what possible reason was there why the two sums were not invested in the same names? Besides, at the very same time the lady had a large sum of stock in her own name, and could anything be more absurd than to suppose that a lady with £4000 or £5000 in her own name at that time in the same stock, and having a sum of £500 to invest out of her savings, should go and invest £250 in the name of herself and a young gentleman who was living in her house, and another £250 in the name of herself and her companion, and yet intend the whole to be for herself? I cannot come to any other conclusion than that it must have been intended by way of a present after her death.

Then, when we have once arrived at the conclusion that the first investment was intended as a gift (and the second was exactly similar), and when we find that the account was opened for the purpose of gift, those facts appear to me to rebut the presumption altogether, because when an account is once found to be opened

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for the purpose of gift there is very strong reason to suppose that everything added to that account was intended for the purpose of gift also. Assuming the testatrix to know that she had made a gift, and had invested a sum of money in stock in the joint names of herself and *Pascoe* for the purpose of making a present to him, it would certainly be a very extraordinary thing that she should go and add other large sums to that account, not for the purpose of making a present to him, but for the purpose of his being a trustee. I cannot help coming to the conclusion that, as a matter of fact, these investments were intended for the purpose of gift.

There were one or two facts relied on against this conclusion. It was said that Mr. *Pascoe* kept the matter secret for a great number of years, and never revealed it. I do not greatly rely on that. Every one who has experience knows that some persons are very reticent about their affairs, and some persons are always talking about them. You cannot form any inference as to that. If he really and *bonâ fide* believed, and had no doubt that it was intended for a gift, and for his use, I do not see that there was anything extraordinary in his not mentioning it to the persons who now say it was not mentioned to them. The only fact that in the least degree, in my opinion, went against him was his not accounting for the dividend which was due at the death of the testatrix. I think it is not at all impossible that he might have honestly believed that that was his, although I entirely agree that in point of law it was not so; therefore on the whole I come to the same conclusion as the Lord Justice.

Solicitor for the Plaintiffs: Mr. *J. W. Heritage.*
Solicitors for the Defendants: Messrs. *Thompson & Groom.*

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L. JJ.
1875
March 24.

[1875 G. 38.]

Shooting—Cutting Timber—Injunction.

A landowner, who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting. Order of *Hall*, V.C., reversed.

By an agreement, dated the 27th of October, 1874, the Rev. *H. D. Baker*, the Defendant, as trustee under the will of *E. D. Poore*, Esq., agreed to let to *John Gearns*, Esq., the Plaintiff, for twenty-one years, determinable at the end of the first seven or fourteen years, at the yearly rent of £125, a mansion-house in *Wiltshire*, called *Syrencot*, with the grounds and about seventeen acres of land, together with the exclusive right of shooting, coursing, and fishing over 1300 acres more or less of land adjoining. The Plaintiff alleged that he was induced to enter into this agreement on the faith of an inspection of the estate, and of its apparent capabilities for sporting purposes, particularly as comprising coppices, woods, plantations, and belts of trees. In November, 1874, the Plaintiff saw persons marking trees for felling, and remonstrated with the Defendant thereon. Since that time the Defendant had advertised for cutting and sale 7500 trees, including practically the whole which were standing in five of the plantations on the 1300 acres, and the Defendant proposed to allow the purchaser to fix and use a steam-engine and saw-mill, &c.; the conditions of sale of the timber stated also that some of the trees were to be grubbed up. The Plaintiff alleged that the cutting the trees and grubbing would destroy the cover for game, and that the drawing the timber and putting up the saw-mill would interfere with and disturb the game.

The Plaintiff filed a bill stating as above stated, and praying that the agreement to grant a lease might be specifically performed, and that the Defendant might be restrained from cutting the timber.

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The Plaintiff moved before the Vice-Chancellor *Hall* for an injunction, adducing evidence of the facts above stated, and that the acts complained of would interfere with the shooting.

The Defendant adduced evidence that the trees were in some places standing too close together, and in others injured the underwood; that he had in April, 1874, determined to have these trees cut, and that it was proper that they should be cut. The trees had been sold, and some had been cut before the motion was made.

The Vice-Chancellor *Hall*, on the 5th of March, granted an *ex parte* injunction, and on the 18th of March granted an injunction to restrain the cutting of the timber; either party to be at liberty to apply in Chambers as to cutting down any trees not already felled.

The Defendant, by way of appeal, moved to dissolve the injunction.

Mr. *Lindley*, Q.C., and Mr. *Shebbeare*, for the Defendant:—

We do not propose to do anything except what is proper for the management of the estate. It is absurd to suppose that for about 1*s.* an acre we can have intended to part with the right of cutting trees or planting as we please. It is not pretended that we are acting wantonly or maliciously: *Jeffryes* v. *Evans* (1) is exactly in point.

Mr. *W. Renshaw* (Mr. *Dickinson*, Q.C., with him), for the Plaintiff:—

We took this shooting supposing that the land would be left as we found it, but if these woods are cut the covers will be destroyed. Besides, the hauling of the timber and the noise of the saw-mill will drive away the game. *Frogley* v. *Earl of Lovelace* (2) is an authority, and what the Master of the Rolls said in *Pattisson* v. *Gilford* (3) is a clear statement of our rights.

SIR W. M. JAMES, L.J.:—

I am of opinion that this injunction is unsustainable.

(1) 19 C. B. (N.S.) 246. (2) Joh. 333.
(3) Law Rep. 18 Eq. 259.

The agreement is an ordinary agreement for letting shooting, and I must say that it would be an immense surprise to many persons who let shooting in this way to learn that they are to be interfered with by this Court or by any other Court in their mode of managing their own property. It is preposterous to suppose that a man who grants a shooting lease for twenty-one years is to be dictated to by this Court as to whether he shall cut down a tree or remove a coppice, because by so doing he would be driving away the hares or interfering with the breeding of the pheasants. If men mean to acquire such rights, they must express their meaning clearly. I am of opinion that such rights are not expressed and not implied in the ordinary grant of shooting, and that this Court has no right to interfere in the way suggested. As this case stands, it is the common case of a man who has granted the right of shooting, and is minded to deal with his estate as other landowners deal with their estates, and I am of opinion that there is no right or power in this Court to interfere with him in so dealing.

The injunction must be dissolved, and the Defendant will have his costs of the motion in the Court below.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. The question is purely legal, whether a landowner, by the mere granting under seal to another person the exclusive right of shooting, coursing, and fishing over 1300 acres of land which still remain in his possession, is prevented from cutting his trees. I am of opinion that he is not, and that on such a grant no action at law for simply cutting his trees would lie against him. There is evidence that the cutting of the trees will prejudice the shooting this year, and I have no doubt that it will do so; but there is no evidence that the landowner is not cutting the trees *bonâ fide*, and because the trees in the ordinary and proper course of management ought to be cut. There is a lease for twenty-one years, and there is evidence that the trees are in a state which require cutting; and is it to be said that the landowner, for the whole period of twenty-one years during which this lease is running, is to abstain from cutting the timber upon his estate merely because he has let the right of

L. JJ. 1875 GEARNS v. BAKER.

shooting? In my opinion, the right of shooting is a right to shoot over the lands as the lands may happen to be at the time, the landlord, of course, not doing anything for the express purpose of injuring the right of shooting. It is unnecessary to consider whether he could turn the covers into pasture or arable land, because he is not proposing to do anything of the kind. All he is proposing to do is to cut down trees, and next year he may propose to replant, which, I suppose, it would then be contended was again interfering with the right of shooting.

In my opinion, the landowner in this case is not prevented from managing his estate in the way he thinks best, and this injunction must be dissolved.

Solicitors: Mr. *E. M. Chubb;* Messrs. *Abbott, Jenkins, & Abbott.*

L. JJ. 1875 *April* 19.

DIMOND *v.* BOSTOCK.

[1873 D. 26.]

Gift to a Class—Designatio Personarum—Persons excepted by Name—Nephews and Nieces of A. living at his Death.

A testatrix gave personal estate in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except *A.* and *B.*, as tenants in common. Two nephews, who would otherwise have taken under the bequest, died before the testatrix, one before and the other after the will:—

Held (affirming the decision of *Malins*, V.C.), that the gift was to a class, and not to designated persons, and therefore that there was no lapse, but the fund was divisible among those of the class who survived the testatrix.

THIS was an appeal from a decision of Vice-Chancellor *Malins*. *Emma Bostock*, the widow of *Ellis Bostock*, by her will dated the 2nd of June, 1869, gave the residue of her personal estate to *C. J. Dimond* and *B. J. Attenbury*, whom she appointed her executors, upon trust to convert the same into money; and she declared the trusts of the proceeds in the following terms:—"In trust for all the nephews and nieces in the first degree of relationship to my late husband *Ellis Bostock*, who were living at the time of his decease, excepting the said *Evereld Catherine Rickards* and *James Bethune Bostock*, in equal shares as tenants in common."

The testatrix died in September, 1872. At the time of her husband's death there were nine nephews and nieces who answered the description in the will, besides the nephew and niece who were excepted. Of these one nephew died in 1868, before the date of *Emma Bostock's* will, whether with or without the knowledge of the testatrix did not appear, and another died in 1872, after the date of her will, but in her lifetime.

A suit having been instituted by the executors and trustees, a question arose as to the division of the residuary fund, the next of kin of the testatrix contending that it was divisible into ninths, and that the shares of the two nephews who had died lapsed. The Vice-Chancellor, however, decided that the gift was to the nephews and nieces as a class, that those only were included in the class who survived the testatrix, and that the fund was accordingly divisible into sevenths.

From this decision the next of kin appealed.

Mr. *Glasse*, Q.C., and Mr. *Caldecott*, for the Appellants:—

We contend that the legatees in this case, although described as a class, are in fact *personæ designatæ* as much as if they were mentioned by name. The persons were ascertained at the date of the will by the words "living at the time of his decease." If the Court should hold that the two deceased persons were not included in the gift, it would strike those words out of the will. In *Viner* v. *Francis* (1), which was relied on by the other side, there were no such words. The gift was simply "to the children of my late sister." A distinctive characteristic of a class is that it is fluctuating, which is not the case with the legatees here. In *Leigh* v. *Leigh* (2), the Master of the Rolls said: "Where a legacy is given to a class of persons, that class is to be ascertained at the time of distribution." But here the persons were known at the time of the gift, and their number was incapable of increase or diminution. So in *Cruse* v. *Howell* (3), Vice-Chancellor *Kindersley* says: "If there is a bequest to certain persons *nominatim*, or so described as to be fixed at the time of the gift, so that there can be no fluctuation, then if one of them dies in the lifetime of the testator, his

(1) 2 Bro. C. C. 658. (2) 17 Beav. 605, 607. (3) 4 Drew. 215, 217.

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share lapses." In *Havergal* v. *Harrison* (1) a gift to "my brothers and sister" was held a *designatio personarum;* and in *Hall* v. *Robertson* (2) a gift to "unmarried daughters" was held to designate those who were unmarried at the date of the will. It is true that *Jarman,* in his Treatise on Wills (3), says that a gift to children living at the death of *A.* is a gift to a class, but the authorities which he cites do not bear out his proposition. We have here the additional fact that the testatrix excepts by name a nephew and niece of her husband, shewing that the others were referred to as a class merely to avoid the trouble of mentioning them all by name.

Mr. *J. Pearson,* Q.C., and Mr. *Woodroffe,* for the legatees, were not called on.

Mr. *Rawlinson* for the executors.

SIR W. M. JAMES, L.J.:—

I am of opinion that the construction which the Vice-Chancellor has put upon this will ought not to be disturbed. The rule of the Courts with regard to lapse very often operates against the intention of a testator, and the Court has made this modification of the rule, that where there is a gift to a class, the rule of lapse does not apply. In that case the fund is to be divided among the members of the class living at the period of distribution, unless the words describing the class are used for mere brevity, instead of designating the persons by name. If this had been the first occasion on which the point had arisen, there might have been good ground for contending that the legatees in such a gift as the present were *personæ designatæ,* just as if the testator had mentioned their names. But we have first the authority of *Viner* v. *Francis* (4), in which there was a gift to "the children of my late sister." It was impossible that there could be any fluctuation in that class; it was just the same as if it were a gift to the persons by name who answered that description. They were *personæ designatæ* quite as much as the members of the class in the present case. Then

(1) 7 Beav. 49.
(2) 4 D. M. & G. 781.
(3) 3rd. Ed. vol. ii. p. 142.
(4) 2 Bro. C. C. 658.

there was the case of *Lee* v. *Pain* (1), where the gift was "to the children of *B. Moore* who shall be living at the time of his decease." That was followed by *Leigh* v. *Leigh* (2), which appears to me undistinguishable from this case. There the gift was to "the present born children of *H. Leigh*." And yet in all these cases the rule as to treating the legatees as a class prevailed. There being these authorities, are we justified in overruling them, only in deference to the *dictum* of Vice-Chancellor *Kindersley* in *Cruse* v. *Howell* (3), which is in favour of the contention of the Appellants? The Vice-Chancellor there says: "If there is a bequest to certain persons *nominatim*, or so described as to be fixed at the time of the gift, so that there can be no fluctuation, then if one of them dies in the lifetime of the testator, his share lapses." But in laying down this canon of construction the Vice-Chancellor had no intention of overruling *Lee* v. *Pain* and *Leigh* v. *Leigh*, which he considered to be consistent with his decision. These cases are quite sufficient warrant for the decision of the Vice-Chancellor in the present case, and we ought not to reverse it.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think we ought not to reverse the rule on which the Court has long acted in such cases. In the first place it is clear that the exception of two persons from the class can make no difference. It would be absurd to say that if there is a gift to all the children of *A.* except his eldest son, that is not a gift to a class. Then as to the argument that the persons are designated by the words "living at the time of his decease," I think that those words were only inserted to shew that the class was not to be capable of increase. They are a description of the persons included in the class, who were to be all persons born in the lifetime of the husband, and not nephews and nieces born after his death. There is no reason why the ordinary rule should not apply in this case. Therefore the order of the Vice-Chancellor must be affirmed with costs.

Solicitor for the Plaintiff: Mr. *C. B. Dimond.*

Solicitors for the Defendants: Messrs. *Robinson & Preston.*

(1) 4 Hare, 201. (2) 17 Beav. 605. (3) 4 Drew. 215.

L. JJ.
1875
May 3.

LEECH *v.* BOLLAND.

[1872 L. 108.]

Practice—Leave to use Affidavits filed after Evidence is closed—New Issues— 15 & 16 *Vict. c.* 86, *s.* 38.

Where after replication the Plaintiff's evidence raised new issues of fact not raised in the bill, the Court allowed the Defendant to file fresh affidavits after the time for closing evidence had expired; but the fresh evidence was to be strictly confined to the new issues raised by the Plaintiff, and the Plaintiff was to be at liberty to cross-examine.

The order of *Bacon*, V.C., affirmed.

THIS was an appeal from an order of Vice-Chancellor *Bacon*, giving leave to the Defendant to use affidavits which had been filed after the time for taking evidence had been closed.

The bill was filed to restrain the Defendant from attaching to cloths sold by him a certain mark or ticket which the Plaintiff alleged to be a violation of his trade-mark. The Defendant by his answer denied the exclusive right of the Plaintiff to the mark, and alleged that he had for many years past exported cloths with that mark to *India*, where the Plaintiff had agents who must have known of such user of the mark by the Defendant.

Replication was filed in the suit, and both parties went into evidence, which was closed on the 1st of October, 1874. One of the affidavits filed by the Plaintiff contained certain statements as to the reputation borne by the Defendant's goods in *India*, and also a statement that there was a custom in the trade to sell such goods in the Indian market in bales, which rendered it difficult for the Plaintiff's agent to detect the infringement of the trade-mark. Neither of these issues was raised by the bill.

In answer to this evidence the Defendant filed affidavits by himself and other persons who had recently arrived from *India*, which were filed on the 8th of March, 1875. The Vice-Chancellor, on the application of the Defendant, gave leave to read these affidavits at the hearing, without prejudice to any objection to the evidence, and with power to the Plaintiff to cross-examine the witnesses. The Plaintiff appealed from this order.

Mr. *Little*, Q.C., and Mr. *W. F. Robinson*, for the Appellant:—

The application is unreasonable, and was only made for the purpose of delay. The new facts put in issue by the Plaintiff were only subsidiary to the main points raised by the bill, and the Defendant, under the pretext of answering them, has taken the opportunity of going into the whole question in the suit and supplementing his former evidence. This is quite contrary to the practice in Chancery where replication has been filed, and would directly encourage perjury. Leave is never given to admit new evidence after the time has expired, except on very special grounds which do not exist here. The proper course would be to allow the application to stand over till the hearing, when the Court would be better able to judge of its propriety: *Boyse* v. *Colclough* (1); *Scott* v. *Mayor, &c., of Liverpool* (2); *Thompson* v. *Partridge* (3); *Thexton* v. *Edmonston* (4).

Mr. *Kay*, Q.C., and Mr. *W. E. M. Tomlinson*, for the Defendant, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that we ought not to exclude the fresh evidence on the new issues; but the evidence must be strictly confined to the two new points raised by the Plaintiff's affidavit, namely, the course of dealing in the bazaars, and the reputation of the Defendant's goods in *India*. The costs will be dealt with by the Vice-Chancellor at the hearing.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale, Shipman & Seddon, Manchester*; Messrs. *Cunliffe & Beaumont*.

(1) 1 K. & J. 124.
(2) 1 De G. & J. 369.
(3) 4 D. M. & G. 794.
(4) Law Rep. 5 Eq. 373.

L. JJ.
1875
March 22.

DRAKE *v.* TREFUSIS.

Money to be invested in Land—Buildings—Repairs—Permanent Improvements.

Money which, under the provisions of a deed, will, or private estate Act, is to be invested in the purchase of land, as well as money so to be invested by virtue of the *Lands Clauses Act* or the *Settled Estates Act*, will in a proper case be ordered by the Court to be employed in erecting new buildings on land already settled to the same uses. But the Court will not sanction its being laid out in repairs, or in permanent improvements not placing new buildings on the land.

THIS was an adjourned summons, which was mentioned to the Lords Justices by desire of the Master of the Rolls.

Lord *Rolle*, the testator in this cause, by his will, dated the 2nd of November, 1837, directed the surplus income of his residuary real estate to be accumulated at compound interest during the period therein mentioned, for such purposes as he had declared concerning the residue of his personal estate. The testator gave his residuary personal estate to trustees upon trust that they should convert it and lay out the proceeds "in the purchase of lands, tenements, and hereditaments lying near or contiguous to some one or other of my manors of *Bickton*, *Stevenstone*, or *Hudscott*, in the county of *Devon*," and directed the estates so purchased to be conveyed to the uses declared by his will concerning his estates in that county.

The testator died in 1842, and on the 30th of January, 1845, a decree was made establishing his will and directing the trusts to be carried into execution.

By a private Act, 28 & 29 Vict. c. iv., powers of sale and exchange were conferred on the trustees of the will, and they were directed to invest the moneys arising under any of the powers in the Act, and which should not, under any of the powers therein contained, be otherwise applied, "in the purchase of estates of inheritance in fee simple, or of copyhold hereditaments, for a customary estate of inheritance in fee simple," to be conveyed to the uses declared by the will concerning the *Devon* estates.

In 1856, the present tenant for life attained twenty-one, and

was let into possession. There was now in Court a considerable sum, arising from the personal estate and the rents which had been accumulated during the period of accumulation, and from moneys arising from sales under the Act.

On the 1st of July, 1873, an order was made by the then Master of the Rolls authorizing the application of £18,340 out of the funds in Court in repairing and rebuilding the cottages therein referred to on the testator's estates in *South Devon*.

On the 30th of March, 1874, a fire broke out at the testator's mansion-house at *Bickton*, and totally destroyed the north and east wings and partially destroyed the west wing. The mansion-house was insured in £9900; but this sum was apportioned between the mansion-house itself, the three wings, and the conservatory. The sums apportioned to the three wings amounted together to little more than half the estimated expense of reinstating them. The deficiency was reckoned at not less than £4000.

On surveying the *North Devon* estate in 1875, it was found that many of the cottages and farm buildings required to be repaired or rebuilt. The estimated amount of expenditure required was nearly £31,600, the items being roughly as follows—repairing cottages, £3500; repairing farm buildings, £3800; erecting new cottages, £6900; erecting new farm buildings, £17,400. Some farm buildings also required to be erected on the *South Devon* estate.

A summons was taken out on behalf of the tenant for life, asking that the trustees might be at liberty, out of any moneys in their hands arising from the sale of real estate, to apply any sums not exceeding in the whole £4300 towards reinstating the parts of the mansion which had been destroyed by the fire, and also to apply any sums not exceeding in the whole £32,000 "in or towards payment of the cost of building or permanently improving farm-houses, homesteads, farm buildings, and cottages" on the *North Devon* estate; and also to apply any sums not exceeding in the whole £5500 in the erection of farm buildings on the *North Devon* estate; and that, if the moneys in the hands of the trustees were not sufficient for the above purposes, then that the deficiency might be raised from time to time out of the funds in Court.

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The Master of the Rolls desired that the case might be mentioned to the Court of Appeal.

Mr. *Kekewich* now mentioned the case to the Court of Appeal on behalf of all parties:—

In the case of *In re Newman's Settled Estates* (1) your Lordships allowed timber-money to be applied in permanent improvements. This was the first case under the *Settled Estates Act*. *In re Leigh's Estate* (2) is a similar case under the *Lands Clauses Act*. In *Brunskill* v. *Caird* (3) a similar point came before Lord *Selborne* sitting for the Master of the Rolls, and his decision caused the difficulty felt by the Master of the Rolls in the present case. In the case of *In re Nether Stowey Vicarage* (4) an application of sale-money in repairs of existing buildings was not allowed. There is no authority expressly deciding that the cases in favour of the application apply where the money is dealt with under the ordinary jurisdiction of the Court, according to the trusts declared in a deed, or will, or a private Act of Parliament, all the cases being under public Acts.

SIR W. M. JAMES, L.J.:—

In my judgment there is less difficulty in acceding to an application of this description where the money arises under the trusts of a will or settlement, or, which is much the same thing, under a private Act of Parliament, and is dealt with under the ordinary jurisdiction of the Court, than where it arises under the provisions of a public Act of Parliament, which prescribes the mode of applying it. I think, therefore, that the cases in which moneys arising under the *Settled Estates Act* or the *Lands Clauses Act* have been applied in what is not strictly a purchase of land are authorities in point when it is sought to deal in a similar way with moneys arising under the trusts of a deed, will, or private Act. We never intended, however, to go further than this, that the expending money in building a house on a vacant piece of ground forming part of the settled property is in substance the same thing

(1) Law Rep. 9 Ch. 681.
(2) Ibid. 6 Ch. 887.
(3) Law Rep. 16 Eq. 493.
(4) Ibid. 17 Eq. 156.

as buying a house; and that money to be invested in the purchase of real estate may therefore be properly applied in the erection of new buildings. Repairs and permanent improvements do not come within this principle. I am, therefore, of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay in permanent improvements which do not put new buildings on the ground. But I consider that the proposed outlay in the erection of new farmhouses, cottages, and other buildings, whether in addition to those existing before, or in substitution for such as have become so ruinous that they must be taken down, is an allowable mode of applying the money, provided the Judge be satisfied that it is beneficial to the estate.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Frere, Forster, & Frere.*

Ex parte COLLINS. *In re* LEES.

Bill of Sale—Defeasance or Condition—Registration—Formal Possession—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 2, 7.

A bill of sale of chattels, with power to take immediate possession, was expressed to be made in consideration of an advance of £130 to be repaid by certain instalments without interest, the whole to become payable on default in any instalment. In fact, the sum advanced was only £100, the mortgagee, who was a money lender, charging the £30 by way of bonus and interest. A written memorandum was signed by the mortgagor, at the same time as the bill of sale, which stated that the £30 was to be paid in full, notwithstanding that the money secured by the bill of sale might be repaid, or the mortgagee's rights under it enforced, before the expiration of the time limited for payment. The bill of sale was registered; the memorandum was not:—

Held (reversing the decision of the Chief Judge), that the memorandum was not a condition within the meaning of sect. 2 of the *Bills of Sale Act*, 1854, and that its not being registered did not affect the validity of the bill of sale.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 11th of February, 1874, *John Lees*, a farmer, at *Martin*

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Hill, Staffordshire, executed a bill of sale of all his live stock, farming stock, growing crops, household furniture, and effects, at his farm, to *Abraham Collins*, a money lender. The mortgage was expressed to be made in consideration of £130 advanced by the mortgagee to the mortgagor, and the deed provided for repayment of the £130 by five consecutive monthly instalments of £3 each on the 11th of each month, beginning with March, and the balance of £115 on the 11th of August, 1874; and if these payments were duly made, the deed was to become thereupon void. No interest was stipulated for by the deed. Power was given to the mortgagee, either immediately after the execution of the deed or at any future time, at his own discretion and without any notice, to take and retain possession of the property until all moneys thereby secured should be paid. It was further provided that if default should be made in payment of the mortgage money by the appointed instalments, it should be lawful for the mortgagee to sell the property, and repay himself the whole amount remaining unpaid.

Though the sum of £130 was in the deed expressed to have been advanced to *Lees*, and the usual receipt for that sum was indorsed, yet in fact the sum lent was only £100, the £30 being *Collins's* charge for making the loan.

At the same time the following memorandum was signed by *Lees*:—

"Feb. 11th, 1874.

"Mr. *Abraham Collins*.

"I have this day granted to you a bill of sale to secure the sum of £130, in which sum is included your charge of £30 for making the advance, which charge is to be paid to you in full, notwithstanding that the money secured by the bill of sale may be repaid, or your rights under the bill of sale enforced before the expiration of the time for payment mentioned in the bill of sale."

The bill of sale was registered, but the memorandum was not.

On the 6th of March *Collins* sent two men to take possession of the property. These men went to the house and remained there, but did nothing to interfere with the mortagor's use and enjoyment of the property before the 10th of March, on which day *Lees* filed a liquidation petition. On the 13th of March, the first instalment

not having been paid, *Collins*, by his agent, seized and drove away some of the cattle upon the farm, which were taken to *Nottingham* market, and sold there on the 18th of March.

The Judge of the County Court of *Burton-on-Trent* refused an application by the trustee for an order declaring the bill of sale void as against him. The trustee appealed, and the Chief Judge (1) reversed the decision of the County Court Judge, and

(1) 1874. Dec. 7. WN (1874) 265.

SIR JAMES BACON, C.J.:—

Upon the question whether the registration required by the *Bills of Sale Act* is perfect in this case, or whether it is imperfect for want of registration of the memorandum which accompanied the contract, the case of *Robinson* v. *Collingwood* (17 C. B. (N.S.) 777) was referred to (a decision of the Court of Common Pleas which I am bound to treat with the utmost respect, and which is said to be a decision in favour of the present Respondent).

In that case, the money which had been lent being the money of a man whose name did not appear in the bill of sale, and the grantee, whose name did appear, being a trustee for him, it was argued that, as the Act requires that all trusts which exist shall appear and be registered with the bill of sale, the registration that had been made was insufficient. The Judges, in their judgments, must be understood as applying their observations to the case then before them. It was that case, and that only, that they decided; and the general expression which fell from them, that the *Bills of Sale Act*, by sect. 2, means only to provide for cases where some benefit is reserved to the grantor, was not necessary to the decision of that case, and is not necessary to that which has to be decided now. If that question ever has to be dealt with, it will be necessary for the Court to take into its consideration the real scope and meaning of that Act, which was passed for preventing frauds on creditors, and to consider whether the nature of the transaction is such that the creditor is misled by it, or whether it does not come within the mischief which the statute seeks to prevent.

Now, in the present case, whether the two instruments, taken together, offend against the *Bills of Sale Act* or not, there is an untrue statement on the face of the bill of sale that £130 is advanced. It is untrue that the security ought to have been for £130; £100 only was advanced, and £30 was stopped or retained by the man who took the security for £130. And then the memorandum which accompanied it is in these terms:—[His Lordship read it.] What is the meaning of that? It means that he puts £30 in one pocket and a security for £130 in another, and that security, by the terms of the bill of sale and the memorandum, he is entitled to have enforced. If frauds against creditors are intended to be guarded against by the Act, this is as plain a case of fraud as can be imagined. But for this memorandum, the debtor might at any time have redeemed the mortgage by the payment of the £100. The mortgagee, in effect, has said: "I have lent you £130;" but, instead of lending him £130, he has lent him only £100, and he kept in his pocket £30, which, according to the tenor of the bill of sale, ought to be in the pocket of the borrower. The trustee under the liquidation would have had

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ordered the net proceeds of the sale, amounting to £126 5*s.*, to be paid to the trustee.

Collins appealed.

Mr. *Winslow*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

The condition intended by 17 & 18 Vict. c. 36, s. 2 (1) is a condition for the benefit of the grantor. The object of the *Bills of Sale Act* was two-fold, that charges should be made known so that the debtor might not gain credit by the apparent ownership of unincumbered property, and that the interest of the debtor should be made known so that the property cannot, by means of a bill of sale, be abstracted from his creditors for his own benefit: *Robinson* v. *Collingwood* (2); *Ex parte Southam* (3). The present memorandum is not a condition for the benefit of the grantor, it is, if anything, an additional bill of sale the non-registration of which does not affect the former; but it is in fact mere surplusage, and does not alter the rights of the parties at all.

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a right to redeem these goods upon payment of £100, but, by means of that memorandum, which ought to have been filed and made part of the bargain, he could not do so, because the security was for £130, although £30 was retained by the lender. The Act of Parliament requires any condition, defeasance, or trust to be expressed in the contract between the borrower and the lender which is registered. The condition on which this advance was made was in effect this: "I will pretend to lend you £130, for which you are to give me security; but I will only lend you £100, notwithstanding that I take a security which I may enforce for £130." Upon the other point, on the authority of *Ex parte Jay* (Law Rep. 9 Ch. 697), I am of opinion that the possession taken by the mortgagee was only formal, and before anything more than a formal possession was taken the act of bankruptcy occurred, and therefore the trustee is entitled to the property which was seized by the mortgagee under his bill of sale.

(1) Sect. 2: "If such bill of sale shall be made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this Act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes, as against the same persons and as regards the same property and effects, as if such bill of sale or a copy thereof had not been filed according to the provisions of this Act."

(2) 17 C. B. (N.S.) 777.

(3) Law Rep. 17 Eq. 578.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee :—

The principle of the Act is, that the truth of the transaction shall appear on the register. The memorandum operates to exclude an equity, the right to enter into the question how much money had been advanced. It therefore alters the liability of the mortgagor, and is a condition within the meaning of sect. 2. The case is similar to *Ex parte Southam* (1), which rules it in our favour.

Mr. *Winslow*, in reply.

March 4. SIR W. M. JAMES, L.J. :—

This case comes before us on an appeal from a decision of the Chief Judge, who has held the security of the Appellant to be invalid under the *Bills of Sale Act* because a contemporaneous memorandum was not registered. *Lees*, being in pecuniary difficulties, applied to *Collins* for a loan of £100, and on the occasion of the loan executed to him a bill of sale of the live stock, farming stock, growing crops, household furniture, and effects at his farm. This bill of sale, though the money advanced was only £100, purports to be in consideration of £130, which sum is stated in the deed to have been paid by *Collins* to *Lees;* but *Collins* states in his evidence, and the fact no doubt is, that the £30 was his charge for making the loan. The bill of sale was duly registered. It is a bill of sale providing for payment of £130 by certain instalments; but in certain events the whole sum was to become payable at once. That being the nature of the bill of sale, this memorandum was signed by the debtor. [His Lordship read the memorandum.] Before the first instalment had become due, *Lees* filed a petition for liquidation. Default in payment of the first instalment having been made, and the whole sum so having become payable, *Collins* sold part of the goods and received the proceeds to an amount less than the £130. The trustee under the liquidation applied to the Court to order payment of the proceeds to him as being part of the debtor's estate. The County Court Judge thought that *Collins* was entitled to retain what he had received, the Chief Judge differed from him and ordered *Collins* to refund the money,

(1) Law Rep. 17 Eq. 578.

L. JJ. 1875

Ex parte COLLINS. *In re* LEES.

and we have now to determine which of these opposite decisions is correct.

The question is, whether the non-registration of the memorandum avoided the whole transaction. The Act, after providing that every bill of sale shall be registered, has in its 2nd section this provision:—[His Lordship read the 2nd section.] The question, then, is, whether this memorandum is a defeasance, condition, or declaration of trust subject to which the bill of sale was made or given. It certainly is not a defeasance, nor is it a declaration of trust. Is it, then, a condition either in the technical or ordinary sense of the word? Conditions may be either precedent, subsequent, or inherent. A condition is precedent where, unless it is complied with, the estate does not arise; it is subsequent where, if it is broken, the estate is defeated; it is inherent where the estate is qualified, restrained, or charged by it; in every case it denotes something which prejudicially affects the interest of the donee. The present memorandum does not restrict, qualify, or charge the interest which is given to the creditor by the bill of sale; if it does anything it gives an additional benefit to the creditor. It amounts to this: "Doubts may arise whether the £30 is not in the nature of interest, and, therefore, whether there ought not to be an abatement in case of the security being enforced within the three months: so to prevent all doubt, I, the debtor, say that the intention of the parties to the bill of sale was that the £30 should be paid in full, notwithstanding the rights of the creditor under the bill of sale may be enforced within three months." If this is in substance anything, it is an additional bill of sale, of which the grantee cannot avail himself if it is not registered, but the non-registration of an additional bill of sale does not affect a previous registered one. Putting the memorandum aside, what are the rights of the parties under the bill of sale itself? It contains a false statement that £130 was paid, when, in fact, only £100 was paid; but the Act has not dealt with matters of that kind. It does not say that a bill of sale shall be invalid if it does not contain a true representation of the transaction, it simply puts a registered bill of sale on the footing on which an unregistered one stood before the Act. If this transaction had taken place before the Act, is there any doubt that the

creditor would have had all the rights which are in terms given him by the bill of sale? The bill of sale is framed so as to conceal a fact which would have been very damaging to the debtor's credit, viz., that he agreed to give £30 for a loan of £100 for three months; but there is no such false recital as the debtor could take advantage of. I am therefore of opinion that the title of the Appellant does not depend upon the memorandum, and that his rights are not affected by its being unregistered.

L. JJ. 1875 *Ex parte* COLLINS. *In re* LEES.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *S. B. Somerville*; Messrs. *Chinery & Aldridge.*

Ex parte KIBBLE. *In re* ONSLOW.

L. JJ. 1875. *March* 11.

Adjudication of Bankruptcy—Petitioning Creditor's Debt—Judgment against Debtor on Contract made in Infancy—Investigating Consideration for Judgment—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62)—*Ratification—Debtor's Summons—Several Creditors joining in one Summons.*

The 2nd section of the *Infants' Relief Act*, 1874, which enacts that no action shall be brought on any ratification made after full age of a contract made during infancy, applies to ratifications made after the passing of the Act, of contracts made before that time.

An infant, before the passing of the Act, gave a bill of exchange, payable after his majority, to a jeweller in payment for jewelry. After his majority, and after the Act came into operation, the creditor obtained judgment by default against him in an action on the bill of exchange, and then took out a debtor's summons, and, on his failing to comply with it, filed a petition for adjudication against him:—

Held, that the Court of Bankruptcy would look into the consideration for the judgment; and that if the conduct of the debtor, in allowing the judgment to go by default against him, operated as a ratification of the bill of exchange, such ratification was rendered void by the 2nd section of the Act; and the petition for adjudication was consequently dismissed.

If several creditors unite in a debtor's summons, they must stand or fall together; and if a petition for adjudication of bankruptcy is founded on the summons, they must all join in it.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

L. JJ.
1875
Ex parte KIBBLE.
In re ONSLOW.

On the 5th of November, 1874, a joint debtor's summons was issued against Mr. *A. P. L. Onslow* by four creditors for four separate debts, namely, *Emanuel Emanuel*, for £258 3*s.* 2*d.*; *W. Kibble*, for £53 18*s.* 7*d.*; *H. C. Green*, for £14 14*s.*; and *R. A. Green*, for £29 6*s.*

The consideration for all these debts was jewelry and money supplied to *A. P. L. Onslow* during his infancy. He attained his majority on the 25th of August, 1874.

Kibble's debt, on which the adjudication of bankruptcy was eventually founded, was for a dishonoured bill of exchange dated the 18th of May, 1874, and drawn in his favour by *A. P. L. Onslow* on his mother for £50, payable at four months after date, in consideration of jewelry and advances of money. After he attained his majority, *Kibble* brought an action against him in the Court of Queen's Bench, under the *Bills of Exchange Act* (18 & 19 Vict. c. 67); and on the 22nd of October, 1874, obtained a judgment against him by default for the amount claimed in the debtor's summons.

It was admitted that *Kibble*, when he supplied the jewelry and money, knew that *Onslow* was an infant.

The debtor was warned by the summons that unless he complied with it he would have committed an act of bankruptcy, in respect of which he might be adjudged a bankrupt on a bankruptcy petition being presented by the said *E. Emanuel*, *W. Kibble*, *H. C. Green*, and *R. A. Green*.

The debtor filed an affidavit in which he swore that he was not indebted to the creditors in the aggregate sum claimed, and that the whole of the debts were contracted by him before he attained the age of twenty-one years, and were not necessaries, and that the debts had not been ratified by him since he attained his majority.

On the hearing of the summons on the 8th of December, 1874, the Registrar ordered that, upon the debtor entering into the usual bond for such sum as *E. Emanuel* should recover in an action against him, and upon payment of the sum of £53 18*s.* 7*d.* within three days to *Kibble*, all proceedings under the summons should be stayed as regarded these debts, and that all proceedings should be stayed with regard to the other debts, without security, till after actions had been brought for recovering the several debts.

The debtor not having paid *Kibble* his debt of £53 18*s.* 7*d.* within the time limited, he filed a petition for adjudication of bankruptcy against him founded on the debtor summons, the other creditors not joining in the petition.

Mr. Registrar *Hazlitt* was of opinion that there was no petitioning creditor's debt by reason of the infancy of the debtor at the time when the goods were supplied, and he accordingly dismissed the petition; and from this decision *Kibble* appealed.

Mr. *E. C. Willis* (Mr. *Roxburgh*, Q.C., with him), for the Appellant:—

We rely upon the judgment obtained against the debtor after he attained his majority. We admit that the Court of Bankruptcy will sometimes investigate the consideration for a judgment, but that is only in cases where fraud or collusion has been proved. In the present case there was nothing of the kind. Mr. *Onslow's* mother was aware of all the circumstances, and accepted the bill drawn by him. But if the judgment in this case can be opened, there was good consideration for it. The *Infants' Relief Act*, 1874 (37 & 38 Vict. c. 62), which came into operation on the 7th of August, 1874, only applies to contracts made after the passing of the Act, and therefore does not touch either the original debt or the bill of exchange in this case. The bill is therefore not void, but only voidable; and although *Onslow* might have pleaded his infancy in the action, he did not do so, and the judgment operates as a ratification of the contract.

Mr. *Winslow*, Q.C. (Mr. *Bagley* with him), for the bankrupt:—

There are two objections to this adjudication. First, that the alleged petitioning creditor's debt was void; and, secondly, that the debtor's summons could not support the petition. As to the first point, it is clear that the Court of Bankruptcy is not bound by a judgment at law, but is in the habit of investigating the consideration for it: *Ex parte Bryant* (1); *Ex parte Marson* (2). If otherwise, a debtor might elude all his just creditors by allowing judgments to be taken by default against him by friends. In the present case there would have been no consideration to support the judgment,

(1) 1 V. & B. 211, 214. (2) 3 Mont. & A. 155.

L. JJ. 1875

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even before the *Infants' Relief Act*, 1874, as it was founded on the bill of exchange, and a bill of exchange signed by an infant has always been held absolutely void, because an infant cannot trade: *Smith* on Contracts (1). But even if there was a consideration before the late Act, it is now taken away. It is true that the 1st section only applies to contracts made after the passing of the Act, but the 2nd section prevents any valid ratification being made of contracts made in infancy, and that section applies equally to ratifications of contracts entered into before or after the Act (2).

In the second place, we say that the petition for adjudication was irregular. Four creditors joined in the debtor's summons. There is no authority in the Act for this; but if several creditors do join in a debtor's summons, they ought to join in the petition for adjudication.

Mr. *Willis*, in reply, referred, on the first point, to *Harris* v. *Wall* (3); *Ex parte Prescott* (4); and, on the second point, to Forms 4, 5, and 6, in the schedule annexed to the *Bankruptcy Rules*, 1870, which contemplate more than one creditor joining in the debtor's summons.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Registrar in this case was quite right. It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of

(1) Page 209.

(2) 37 & 38 Vict. c. 62, s. 1: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

Sect. 2: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

(3) 1 Ex. 122.

(4) 1 M. D. & D. 199.

the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation. In the present case a bill of exchange had been drawn by an infant for jewelry purchased and money advanced to him. It is not pretended that there was any ratification of the original debt or of the bill of exchange after the infant came of age, until the judgment was allowed to go by default against him, under the *Bills of Exchange Act.* The only question, therefore, is, whether the consideration for the judgment has not been taken away by the *Infants' Relief Act,* 1874. The 1st section enacts that all contracts thenceforth entered into by infants shall be absolutely void; and then the 2nd section provides that no action shall be brought upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy. When the Act says that no action shall be brought, it must mean that the promise or ratification shall not be a good cause of action: so that a ratification made after the Act of a contract made in infancy before the Act is as void as a contract made by an infant after the Act. Therefore, on this ground, I think the Registrar came to a right conclusion.

But as the other question, respecting the form of the summons and the petition for adjudication, has been raised before us, it is right to express our opinion on that also. It appears to me very inconvenient that a number of creditors should club together to take out a debtor's summons, although that course appears to be sanctioned by the forms annexed to the Rules of 1870. I give no opinion against the power of creditors to do this, but I think that if they do unite in this way they must all stand or fall together; and if a petition for adjudication is presented, they must all join in it. The summons cannot be dealt with piecemeal, so that one debt can be made an act of bankruptcy, and security required for another, and a third dealt with in some other way. It is impossible to work out a debtor's summons in that way.

L. JJ. 1875 *Ex parte* KIBBLE. *In re* ONSLOW.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is quite clear that in the Court of Bankruptcy the consideration for a judgment may be investigated, particularly when the judgment has gone by default. I do not mean to say that this rule applies to such an extent that in every case in which a Defendant has a good defence to an action and does not plead it, as, for instance, where he had no notice of dishonour of a bill of exchange, the Court of Bankruptcy would allow the creditors to go behind the judgment. The real question must always be whether there was a good consideration for the debt, and we have therefore to consider whether there was a good consideration in this case. If the Act of 1874 had not passed, I should have doubted whether, as the debt was one which was capable of being ratified in writing, there was not a good consideration for the judgment. But, having regard to the facts of the case, I think that the effect of the Act is to prevent there being any consideration for the judgment. The case is not touched by the 1st section, because the bill of exchange was drawn before the Act was passed. But when the Act came into operation the bill had not become due, and the infant was still under age; and the effect of the 2nd section was to prevent any action from being brought on the bill, although it might have been ratified after the infant came of age. For I am of opinion that that section applies to all contracts made by an infant, provided the ratification is made after the passing of the Act; and that it is to be understood as saying that a debt contracted in infancy shall not in future in any case form a valid consideration on which an action can be brought. The statute in effect places a debt contracted during infancy in the same position as a gambling debt; and a bill of exchange given for a gambling debt cannot form the ground for an action. Even if the debtor does not plead that it was for a gambling debt, and lets the judgment go against him, still the Court of Bankruptcy would go behind the judgment and declare the debt void.

I also agree with the Lord Justice as to the form of the debtor's summons. If several creditors join in a debtor's summons, they must stand or fall together.

Solicitors: Messrs. *R. & E. Bastard;* Mr. *E. Parry.*

Ex parte HARPER. *In re* BREMNER.

L. JJ.
1875
March 11.

Bankruptcy Jurisdiction—Execution Creditor—Action against the Sheriff for Damages—Application in Bankruptcy—Res Judicata.

A judgment creditor levied execution against his debtor, and the sheriff took possession of the debtor's goods; but before the sale took place the debtor filed a petition for liquidation, and a receiver was appointed, who obtained an injunction restraining the sale on giving the usual undertaking to abide by any order as to damages. The liquidation proceedings became abortive, and a petition for adjudication was presented, under which the debtor was adjudicated bankrupt, and the sheriff gave up the goods to the trustee.

The execution creditor then brought an action against the sheriff for damages sustained by his parting with the goods. The action was determined in the sheriff's favour, on the ground that the debtor was a trader, and had committed an act of bankruptcy by suffering the execution. Afterwards, the execution creditor made an application in bankruptcy for damages under the undertaking given by the receiver, in which he relied on the same point as in the action, namely, that the debtor was not a trader:—

Held, that the matter was *res judicata*, and as the creditor had elected to take his remedy at law against the sheriff, the Court of Bankruptcy could not entertain the question.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge.

On the 29th of November, 1873, *T. E. Harper* sued out an execution against *G. W. Bremner*, who was a shipbroker at *Milford Haven*, for a debt of £405 6*s.* 9*d.*, and £1 5*s.* costs, and the sheriff took possession of *Bremner's* furniture and effects at his house at *Milford Haven*, on the 1st of December, 1873. The goods were claimed by the trustees of *Bremner's* marriage settlement, and the sheriff interpleaded; but the claim was ultimately abandoned.

On the 15th of December, *Bremner* filed a petition for liquidation, under which a receiver was at once appointed, and on the 16th of December the receiver obtained an injunction, which was served upon the sheriff, restraining him from proceeding with the execution.

On the 23rd of December the injunction was continued till further order, the receiver and the debtor giving the usual undertaking to abide by any order as to damages.

L. JJ.
1875
Ex parte HARPER.
In re BREMNER.

On the 6th of February, 1874, *Bremner's* creditors refused to pass a resolution agreeing to a liquidation, and a petition for adjudication of bankruptcy was forthwith presented, under which *Bremner* was adjudicated bankrupt.

On the 27th of February the trustee in the bankruptcy gave notice to the sheriff to give up possession of the bankrupt's property to him, which the sheriff did, and the goods were soon afterwards sold by the trustee.

Harper then ruled the sheriff to return the writ of *fi. fa.*, which he did, alleging that *Bremner* was a trader, and had been adjudicated bankrupt, and that he had withdrawn at the request of the trustee.

Harper accordingly brought an action against the sheriff to recover damages sustained by him in consequence of the sheriff having withdrawn from the possession of the goods; to which the sheriff pleaded, and the action came on for trial; but it was agreed that, as the only issue was whether *Bremner* was or not a trader, the matter should be referred to Mr. *Winslow*, Q.C., and an order for reference was accordingly made. Mr. *Winslow* made his award, deciding that *Bremner* was a trader, and a verdict was accordingly entered for the Defendant.

Harper now applied to the Court of Bankruptcy for an order declaring that he had at the commencement of the bankruptcy a valid execution against the goods of the bankrupt, and that the value of the goods might be paid to him out of the assets, and for an inquiry as to the damages sustained by him by reason of the injunction.

The Registrar refused the application, being of opinion that the evidence shewed that the bankrupt was a trader, and that *Harper* had sustained no damage from the injunction. From this decision *Harper* appealed.

Mr. *De Gex*, Q.C., and Mr. *Robson*, for the Appellant, contended, first, that a shipbroker was not a trader within the *Bankruptcy Act*, 1869; and, secondly, that if the bankrupt was a trader, and the execution an act of bankruptcy, *Harper* would have been enabled, if it had not been for the injunction granted under the proceedings in liquidation which had failed, to realize the proceeds of

the sale before the filing of the petition in bankruptcy. On the latter point, they referred to *Ex parte Rocke* (1); *Ex parte James* (2); *Ex parte Villars* (3); *Ex parte Rayner* (4)

Mr. *Little*, Q.C., and Mr. *F. Knight*, for the trustee, objected that the right of the Appellant to the proceeds of the execution had been already decided by the action against the sheriff, and that the matter was in fact *res judicata*.

Mr. *De Gex*, in reply, contended that the question in the action was not between the same parties as the present application; and that the Appellant had a right to seek relief in both Courts.

SIR W. M. JAMES, L.J.:—

I am of opinion that this is a fatal objection to the Appellant's case. The very same point which has been argued here, whether the debtor was or not a trader, was in issue in the action brought by the Appellant against the sheriff, and was decided against the Appellant. The only reason why the Court of Bankruptcy interferes with an execution by the sheriff, and determines such questions as this, is, that it saves expense, that all parties should submit to have their rights decided here. In the present case, the Appellant had no legal or equitable charge on the goods, he had only a right of action against the sheriff. An execution creditor has no remedy at law against the trustee to whom the sheriff has given up the goods; he must proceed against the sheriff for damages. And he having elected to take his remedy against the sheriff, and having failed, why should the Court interfere, when the only reason for interfering is to prevent an action being brought against the sheriff? The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Harper, Broad, & Battcock;* Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale, Shipman, & Co., Manchester.*

(1) Law Rep. 6 Ch. 795.
(2) Ibid. 9 Ch. 609.
(3) Law Rep. 9 Ch. 432.
(4) Ibid. 7 Ch. 325.

L. J. M.
1875
April 16.

Ex parte GIBBS. *In re* WEBB.

Bankruptcy—Liquidation—Meeting of Creditors—Power to call fresh first Meeting.

A debtor, who was a member of a partnership firm, filed a petition for liquidation. In the statement produced by the debtor to the first meeting of his creditors, he made no distinction between his joint and separate debts and assets. The creditors passed a resolution for liquidation, but, by reason of the irregularity of the debtor's statement, the resolution was not registered. The debtor then obtained an order to summon a fresh first meeting :—

Held, that, inasmuch as no valid resolution could have been passed at the meeting, and, consequently, the creditors had had no opportunity of expressing their opinion as to a liquidation, the Court was justified in permitting a fresh first meeting.

Ex parte Cobb (1) explained.

Ex parte Cockayne (2) approved.

THIS was an appeal from an order of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy.

Thomas Stammers Webb, the debtor in this case, was a proprietor of mines, and resident in *London*. He was in partnership with various other persons in different adventures.

On the 16th of January, 1875, *Webb* filed a petition for liquidation by arrangement, describing himself as a colliery proprietor, trading alone. On the 3rd of February the first meeting of his creditors was held. In the statement of his affairs submitted by the debtor to the meeting under the provisions of the 125th section of the *Bankruptcy Act*, 1869, he made no distinction between his joint and his separate debts or between his joint and separate assets. At this meeting resolutions were passed by the statutory majority of creditors agreeing to a liquidation and appointing a trustee. When the resolutions were presented for registration, the registration was opposed by Mr. *R. Gibbs*, one of the creditors, on the ground of the invalidity of some of the proofs, and also on the ground that the debtor had not distinguished in his statement between his joint and separate debts and his joint and separate assets.

It appeared that the last-mentioned objection had been taken

(1) Law Rep. 8 Ch. 727. (2) Law Rep. 16 Eq. 218.

at the meeting of creditors. The Registrar, Mr. *Keene*, considered this objection fatal to the validity of the resolution, following the authority of *Ex parte Cockayne* (1), and refused to register it on that ground; and the other objections were not gone into.

The debtor then applied to Mr. *Murray*, sitting as Chief Judge, for an order that a fresh first meeting might be summoned, and filed an affidavit stating that he had omitted making the distinction between his joint and separate debts and liabilities through ignorance of its being necessary to do so. The Registrar granted the application, and Mr. *Gibbs* appealed from this order.

Mr. *De Gex*, Q.C., and Mr. *Hemming*, for the Appellant:—

Neither the Act nor the Rules give any power to the Court to direct a fresh first meeting to be held; but the power has been assumed by the Registrars, and the practice has gradually grown up. It has never been sanctioned by any formal decision of the Court of Bankruptcy, although in *Ex parte Cockayne* (2) the Chief Judge alludes to the practice. On the other hand, the validity of a fresh first meeting was doubted by the Court of Appeal in *Ex parte Cobb* (3); and Lord Justice *James* there said that, at all events, it could only be held when the first meeting could be shewn to have been no meeting at all. We admit that in such a case, as for example where the first meeting is null for want of notices to creditors, inasmuch as the creditors have never really met together, and have had no opportunity of expressing their opinions, it may be reasonable to call a fresh first meeting if the Rules allow it. But in the present case the first meeting was properly summoned; and the only reason why the resolution was invalid was that the debtor did not comply with the requisitions of the statute. The proper course would have been, when the error was discovered, to adjourn the meeting for the debtor to make a fresh statement. As this was not done, the debtor ought to file another petition and commence proceedings afresh. The present looseness of practice enables debtors, if they fail in obtaining a resolution, to try the question over again, which was not intended by the Act.

(1) Law Rep. 16 Eq. 218. (2) Law Rep. 16 Eq. 220.
(3) Law Rep. 8 Ch. 727.

L. J. M. 1875 *Ex parte* GIBBS. *In re* WEBB.

Mr. *Finlay Knight*, for the debtor, was not called on.

SIR G. MELLISH, L.J.:—

I am of opinion that the decision of the Registrar in this case was perfectly right. The question is, under what circumstances a Registrar is entitled to order a fresh first meeting to be held under a petition for liquidation or composition; and I entirely agree with what was said by Lord Justice *James* in the case of *Ex parte Cobb* (1), that if the opinion of the creditors has been validly taken at a meeting, and the creditors have refused to pass a resolution, in that case the Registrar has no right to order a fresh meeting; the creditors have come to their determination, and they are not to be obliged to come together a second time to reconsider their resolution. But if from some accident or some mistake on the part of the debtor no valid resolution has or could be passed, then it appears to me that, fairly considering the Act (though it is true there is neither rule nor section ordering it), a fresh meeting may be held; for if the meeting was held so as not to give the creditors an opportunity to determine one way or the other, whether for composition or liquidation, then the Court, though it has no express power given to it to call a fresh first meeting, yet has the discretion to determine whether a fresh first meeting should be called or not.

Now, in this case the defect was this—the debtor was bound to produce a statement at the meeting of his liabilities and assets. He had been a partner in one or more firms, and according to a decision of *Ex parte Cockayne* (2), with which I entirely agree, he ought to have distinguished between his joint and separate assets, and between his joint and separate liabilities, and in that respect this statement was defective. The consequence of that was, that it was impossible, unless he had amended the statement—which probably could not have been done at the meeting—that any valid resolution could have been come to. What ought to have been done when that objection was taken, was this: it should have been admitted as a valid objection, and then the opinion of the creditors should have been taken whether they would adjourn the meeting to enable the debtor to amend his statement

(1) Law Rep. 8 Ch. 727. (2) Law Rep. 16 Eq. 218.

L. J. M. 1875 *Ex parte* GIBBS. *In re* WEBB.

or not. If that question had been put to the meeting, and it had been decided by the majority of creditors to adjourn, there is no doubt that at that adjourned meeting a proper resolution would have been come to; but if the majority of creditors had refused, then the Registrar, in his discretion, ought not to have summoned a fresh meeting, because the creditors by refusing would have shewn that they did not wish the proceedings to go on. But here that question was not put to the creditors, notwithstanding this objection was raised. On the contrary, the question as to a composition was put to the meeting, and a resolution for a composition was agreed to—whether by the requisite majority or not does not appear, because that was not inquired into. The consequence is, that the creditors have not had an opportunity of determining whether the proceedings should be by liquidation or composition, or in bankruptcy, and in my opinion they should have an opportunity of determining that before the debtor is made a bankrupt. I do not mean to say that the Registrar ought in every case in which the debtor has made an insufficient statement to permit a fresh first meeting. If it appears that the debtor had wilfully or perversely refrained from complying with the Act, that might be a reason for refusing; or if a formal vote was taken, and the majority of the creditors were against liquidation, that also would be against a fresh first meeting. But if there has been a mistake—what may be called a venial mistake —in complying with the provisions of the Act, and by reason of that the creditors never came to an effectual vote either one way or the other, whether for liquidation or composition, it appears to me that in the fair spirit of the Act the Registrar has power to direct a fresh first meeting of creditors in order that they may have an opportunity of determining the question, which the Act intends them to do.

It is to be observed that in *Ex parte Cobb* (1) the question had been put to the meeting, and the creditors had deliberately determined that they did not desire to have liquidation or composition; and it was in reference to that state of things that Lord Justice *James* says (2): "I have great doubt whether such a meeting has any validity. I can conceive that where a first meeting is shewn to have been no meeting at all, for instance, from the absence of the proper advertisements, it might be the duty of the Court to direct

(1) Law Rep. 8 Ch. 727. (2) Law Rep. 8 Ch. 729.

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a fresh first meeting to be held; but to say that because the debtor finds that he could not do what he wanted to do at the first meeting, or because one of the creditors had changed his mind, that is a reason for holding a fresh first meeting, seems to me a confusion of terms."

The Lord Justice does not consider the question what would be the duty of the Court, if in consequence of the non-compliance of the debtor with something which he ought to do at a meeting, the meeting has gone off. But in *Ex parte Cockayne* (1), which was a case very similar to the present, the Chief Judge appears to have thought that under certain circumstances a new meeting might be called; for he says that the dismissal of the appeal is to be without prejudice to a second first meeting. Therefore, in this case, the appeal will be dismissed with costs.

Solicitors: Mr. *Rowland Miller;* Messrs. *Morley & Shirreff.*

L. JJ. 1875 *March* 22.

REYNARD *v.* ARNOLD.

[1874 R. 70.]

Landlord and Tenant—Fire Insurance—Option of Purchase.

Under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part-payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this brought ejectment against him:—

Held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Malins* granting an injunction.

(1) Law Rep. 16 Eq. 218.

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By an indenture, dated the 11th of February, 1873, the Defendant *Arnold* demised a windmill, dwelling-house, buildings, and land to the Plaintiff *Reynard* for seven years from Christmas, 1872, at a rent of £35, payable quarterly. The Plaintiff covenanted to keep the mill and buildings insured against fire in £800, in the joint names of the Plaintiff and Defendant, and it was agreed that all moneys recovered under the insurance should be applied in reinstating the premises. The Defendant covenanted with the Plaintiff that if at any time during the term the Plaintiff should be desirous of purchasing the premises at the sum of £800, and should before Christmas, 1879, give the Defendant notice in writing of such desire, the Plaintiff should be entitled to become the purchaser at that sum, and that upon payment on or before the 25th of December, 1879, of £800, together with all arrears of rent, insurance, and outgoings, or a due proportion thereof up to the time of payment of the purchase-money, the Defendant would convey to the Plaintiff.

The Plaintiff insured the premises with the *Alliance Office* for £1080.

The mill was destroyed by fire on the 27th of December, 1873, and the Plaintiff made a claim on the insurance office. He then for the first time discovered that the Defendant held a policy of insurance on the property in his own name for £515 in the *Guardian Office*. The total damage was assessed at £600, and was apportioned between the two offices; the *Guardian* paid the Defendant on the 10th of March £220 4*s*., and the *Alliance Office* was ready to pay on its policy £379 16*s*.

On the 13th of March, 1874, the Plaintiff gave the Defendant notice of his desire to purchase, and suggested that the moneys received from the two insurance offices should be applied in part-payment of the purchase-money.

The Defendant's solicitor answered on the 18th of March, taking no notice of the option to purchase, but requiring the Plaintiff to employ the insurance money in reinstating the premises. Some further correspondence ensued, the Defendant insisting that the money to be received from the *Alliance Office* should be applied in reinstating the premises, and threatening to bring ejectment and put in force the provisions of the *Building Act* (14 Geo. 3, c. 68, s. 83). On the 28th of April the Plaintiff's

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solicitor wrote again, insisting on the right to purchase. The Defendant's solicitor replied that the Defendant would at once bring ejectment unless steps were taken to reinstate the premises; and he also sent a notice to the *Alliance Office*, requiring them to cause the insurance money to be applied in reinstating the premises. The Plaintiff then filed his bill for specific performance, for a declaration that he was entitled to the money received from both offices, for an injunction to restrain the Defendant from bringing ejectment, and (par. 4) for an injunction to restrain the Defendant from requiring the sum receivable from the *Alliance Office* to be applied in reinstating the mill, or otherwise than according to the directions of the Plaintiff, and from interfering to prevent the receipt thereof by the Plaintiff. The Defendant by his answer insisted on the right to retain the £220 4*s.* for his own benefit.

Vice-Chancellor *Malins* having granted an injunction according to the fourth paragraph of the prayer, the Defendant appealed. The appeal motion came before the Court on the 15th of March, and stood over to give the parties an opportunity of coming to some arrangement. None having been come to, it was agreed that the Court should dispose of the suit as if it was at the hearing.

Mr. *Glasse*, Q.C., and Mr. *W. W. Cooper*, for the Defendant.

Mr. *T. C. Wright* (Mr. *Higgins*, Q.C., with him), for the Plaintiff, as to the time from which rent was to cease and interest to run, referred to *Weeding* v. *Weeding* (1), *Day* v. *Weeding* (2), where it was held that interest instead of rent began to run from the rent-day last preceding the exercise of the option to purchase.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Plaintiff has been right throughout, and that the Defendant must pay the costs of the suit. The Plaintiff was a lessee with an option of purchase, and was under an obligation to insure against fire. He insured the property in a sufficient amount, a fire occurred, and, the lessor having also insured the property, the insurance effected by the lessee became to a great extent unproductive in consequence of the existence of

(1) 1 J. & H. 424. (2) Reg. Lib. A. 1857, f. 1697.

the other policy, of which he had no notice. The lessee then had a right to say that the lessor must account for what he received under that other policy, and having exercised his option of purchase, he had a right to say that the landlord must take the policy-money on account of the purchase-money. The litigation is owing to the landlord having insisted on retaining the proceeds of one policy for his own benefit, having insisted on the proceeds of the other being applied in reinstating the premises, notwithstanding the exercise of the option of purchase, and having brought ejectment; on all which points, in my opinion, he was in the wrong. According to the terms of the option of purchase the rent was to be paid up to the time of completion: so, allowing a reasonable time for completion, let the Plaintiff pay rent to the 24th of June, 1874, and interest on the balance of the purchase-money from that day to completion. The Defendant must pay the costs of the suit, except that there will be no costs of the motion before us.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Scott, Jarmain, & Co.*; Mr. *J. E. Wilson.*

BEYNON *v.* COOK.

[1874 B. 39.]

Mortgage—Reversion—Expectant Heir—Reasonable Bargain.

A man twenty-six years of age, entitled to a reversion of £600, but wholly without present means, applied to a money lender, who advanced him £85 on a mortgage of the reversion for £100, with a provision that if default should be made in payment of the £100, the £100 should bear interest at 5 per cent. per month. Twelve years afterwards the reversion fell into possession, and on a bill filed by the personal representative of the mortgagor, a decree was made for redemption on payment of the sum borrowed and simple interest at 5 per cent.

Decree of the Master of the Rolls affirmed.

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RHYS BEYNON, at the date of the transaction impeached by the bill, was twenty-six years of age, and had recently married. He was wholly without means, and not having been brought up to

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any business or profession, was unable to procure his livelihood, and was supported chiefly by his wife's relations. He had been entitled to a younger son's portion of £600, charged on the family estate; but in the early part of the year 1860, on the occasion of the sale of the estate, he had released his portion, and had taken in lieu of it the bond of his elder brother for £600, payable on the death of his father, *John Thomas Beynon*, who was then fifty-four years of age, and in good health.

In July, 1861, *Rhys Beynon* was in great pecuniary distress, and applied to a friend named *Whitmore*, who had previously lent him small sums, to assist him in obtaining money. *Whitmore* introduced him to the Defendant, a money-lender named *Robert Cook*. On the 16th of July, *Cook* advanced to *Rhys Beynon* the sum of £85 on his promissory note for £100, payable at six months' date. Payment of the £100 was collaterally secured by an indenture of mortgage of even date, whereby *Rhys Beynon* assigned the bond to *Cook*, and it was declared that *Cook* should stand possessed of the bond upon trust, in case default should be made in payment of the note on the 16th of January, 1862, to sell the bond, and out of the proceeds to retain his costs, charges, and expenses, and the sum of £100, with interest thereon from the 16th of January, 1862, at the rate of 5 per cent. per month.

Rhys Beynon continued in a state of pecuniary distress up to the time of his death. He died on the 26th of October, 1872, leaving his widow, the Plaintiff, his legal personal representative.

John Thomas Beynon died on the 26th of October, 1873.

In December, 1873, the Plaintiff offered to repay the money actually advanced by *Cook*, with compound interest at 5 per cent. to the date of the offer, but *Cook* refused to take less than £400, and after some further correspondence, which led to no result, the Plaintiff filed her bill against *Cook*, praying that it might be declared that the promissory note and mortgage ought to stand as securities only for the money actually advanced to *Rhys Beynon* by the Defendant, with such further sum by way of interest as the Court might award; and for consequential relief.

Cook, by his answer, submitted that the terms on which he made the advance were not unconscionable, and stated, which was not denied, that for several years previously to his death *Rhys Beynon*

was a clerk in the employment of the Plaintiff's solicitor, during which period he never made any attempt to oppose the Defendant's claim or made any complaint whatever against it.

The Master of the Rolls made a decree for redemption on payment of the amount advanced and simple interest at 5 per cent. (1).

(1) 1875. Feb. 15. W.N. (1875) 28

SIR G. JESSEL, M.R.:—

I am of opinion that *Rhys Beynon* was in that peculiar position of reversioner or remainderman which is oddly enough described as an expectant heir. This phrase is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham* v. *Emmet* (14 W. R. 3), and *Earl of Aylesford* v. *Morris* (Law Rep. 8 Ch. 484). So that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners.

Even if you limit the application of the doctrine to the class of persons who, in some popular sense, are expectant heirs, I hold that *Rhys Beynon* was one. His property consisted of this reversionary sum, and nothing else. He was in great distress, and a friend introduced him to Mr. *Robert Cook*, who took from this young man a promissory note for £100, for which he was charged £15 discount for six months, and a mortgage of his reversionary interest, whereby he covenanted, in case of the note not being paid (and everybody knew that it would not be paid) to pay interest at the rate of 5 per cent. per month until *Cook* was paid by the sale of the bond, or by the reversion falling into possession.

The point to be considered is, was this a hard bargain? The doctrine has nothing to do with fraud: *Bowes* v. *Heaps* (3 V. & B. 117). It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and if it is what is called a hard bargain, sets it aside. It was hardly argued with anything like force or effect on behalf of the Defendant, that such terms could have been obtained from a man who was in a position to offer good security. It was not denied that the obligor was a person in good circumstances, and well able to pay the bond. It was not said, in fact it could not have been said, that the security was not worth more than £85. It was not said this was a bargain which a man who was not in great distress would have acceded to. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges. Yet I have heard a very long argument on the subject. It was suggested that the abolition of the usury laws might have some effect on the case, but their abolition could have

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The Defendant appealed.

Mr. *Brett* (Mr. *Karslake*, Q.C., with him), for the Appellant:—

The borrower was not a young man as in *Earl of Aylesford* v.

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no effect upon the doctrine, because the doctrine was established at a time when the usury laws existed, and therefore could not have been applicable to a case tainted with usury. Then it was suggested that, because the usury laws had been repealed, a bargain that before was unreasonable became reasonable. Upon that *Croft* v. *Graham* (2 D. J. & S. 155) is conclusive, shewing that the repeal of the usury laws does not make a hard bargain with an expectant heir reasonable, because in other cases, the usury laws no longer being in force, persons may make hard bargains with persons entitled to property in possession, or entitled to no property at all.

I have disposed of the argument that *Rhys Beynon* was not an expectant heir. I think he was one in every sense of the word. He certainly was a person entitled to a reversion, and if he borrowed, he must have borrowed either on the reversion, or with a view to the reversion being a security. It has never been said a man can be relieved because he happens to be a reversioner, and the money-lender does not know it, but lends him money upon his promissory note at usurious interest. In order to be relieved, he must have been trusted upon the credit of his expectations: *Earl of Aylesford* v. *Morris*. In this case there is an actual mortgage; and it is not suggested that without the mortgage Mr. *Cook* would have made the advance. The credit went upon the faith of the expectation of the reversion. That is the element, as far as I can see, in all the authorities, and the older authorities are unaffected either by the repeal of the usury laws or by the *Sales of Reversions Act* (31 & 32 Vict. c. 4).

There appears to me to be no question here about that Act. It was considered in *Earl of Aylesford* v. *Morris* to make no difference in the case of a loan, and I do not see how it could make any difference in the case of a loan. What was set aside in the old cases was the loan: *Barnardiston* v. *Lingood* (2 Atk. 133; Barn. Ch. R. 337); the doctrine being, that you must not lend on extravagant terms to reversioners or remaindermen, with a view to getting paid out of the reversion or the remainder; and therefore I say it is the transaction of the loan that is set aside. That part of it has nothing to do with the value of the property. You may not know the value of the expectation, or it may be utterly uncertain, as in *Earl of Chesterfield* v. *Janssen* (1 Wh. & T. L. C. (3rd Ed.) 483), where nobody knew what the old Duchess of *Marlborough* would leave to Mr. *Spencer*, and therefore no one could tell the value of the expectation.

In many other cases, what is called the *spes successionis*, that is, expectant heirship, must depend upon the dealings by the ancestor with the property in his lifetime. Nothing can be more uncertain than these; and therefore the value of the security is not an element for consideration.

The *Sales of Reversions Act* (31 & 32 Vict. c. 4) was passed for the purpose of abolishing the equitable doctrine which set aside the sale of a reversion simply on the ground that the sum paid

Morris (1). In *Webster* v. *Cook* (2) a similar dealing was supported. There is no suggestion of fraud or pressure.

Moreover, the lapse of time is conclusive, and must be taken as a confirmation by acquiescence.

Mr. *Swanston*, Q.C., and Mr. *Crossley*, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L.J.:—

This is a perfectly idle appeal. The appeal is dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitor for the Plaintiff: Mr. *James Mason.*
Solicitor for the Defendant: Mr. *Bebb.*

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was not, in the opinion of the Judges, an adequate value for the thing sold. It was thought by the Legislature that the doctrine rested upon no solid foundation, the value of a thing being what it would fetch. To that extent, no doubt, the law administered by Courts of Equity was interfered with, but, as I said before, the Act seems to have no application to the present case, and even if it had not been so laid down in *Earl of Aylesford* v. *Morris*, I should hold that it has no such application.

One other defence is suggested, and that is, that the bill was filed too late, the transaction having taken place in July, 1861, and the suit not having been instituted until February, 1874. The nature of these cases is, that the distress continues while the interest is running. The object of the rule is to prevent the distress of the reversioner being taken advantage of, and to protect him, according to Mr. *Swanston* (2 Sw. 140, n.), "against the designs of that calculating rapacity which the law constantly discountenances, the distress frequently incident to the owners of profitable reversions, and the improvidence with which men are commonly disposed to sacrifice the future to the present." All these things remain as long as the reversion remains; that is, until it falls into possession there is a continuance of the state of distress and improvidence. In the present case, the reversioner died in the lifetime of his father, the tenant for life. If the objection of delay is available in these cases at all—and I should be the last Judge to say that men shall not seek their legal remedies promptly—it cannot be made available until the death of the tenant for life. Now, in the present case, the tenant for life died in October, 1873, and the bill was filed in February, 1874, so that the objection of delay cannot possibly avail. I therefore make a decree for the delivery up of the securities on payment of the amount actually advanced, with simple interest at 5 per cent., and as more than that was offered to Mr. *Cook* before bill filed, I order him to pay the costs of the suit.

(1) Law Rep. 8 Ch. 484.
(2) Ibid. 2 Ch. 542.

L. JJ.
1875
March 24;
April 23.

ASPDEN *v.* SEDDON.

[1874 A. 2.]

Injunction—Minerals—Support to Buildings—Damages—Grant.

A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, and reserving all mines and minerals under the piece of land, and power to take the same at pleasure, making compensation for damages to be done to the cotton mill. The grantee covenanted to build and keep in repair the cotton mill :—

Held, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured.

Decree of the Master of the Rolls affirmed.

Caledonian Railway Company v. *Sprot* (1) distinguished.

BY an indenture dated the 31st of December, 1861, one *William Stott* conveyed in fee to *John Pilkington*, as a trustee for the *West Houghton Cotton Manufacturing Company*, a piece of land at *West Houghton*, with its appurtenances, subject to the following reservation :—

"Except and always reserved out of these presents, and the direction, appointment, grant, and conveyance hereby made, unto the said *William Stott*, his appointees, heirs, and assigns, all mines, veins, and seams of coal, cannel, and ironstone, and other mines and minerals, lying within or under the said piece of land hereby appointed, granted, and conveyed, or any part or parts thereof, respectively, with full liberty, power, and authority for the said *William Stott*, his appointees, heirs, and assigns, and his, their, or any of their lessees, agents, and workmen, and every or any other person or persons, by his, their or any of their order or permission, at any time or times, or from time to time, to search for, get, win, take, cart, and carry away the same, and sell or convert to his or their own use the said excepted mines, veins, and seams of coal, cannel, and ironstone, and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes, but

(1) 2 Macq. 449.

without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties, or in consequence thereof."

The piece of land was also made subject to the payment to *Stott* and his heirs of a chief rent of £72 3s. 2*d.*, which had since been redeemed. The indenture further contained a covenant by the company to build on the piece of land, and for ever afterwards to maintain in good repair, a substantial building suitable for a cotton mill, and one or more messuages or dwelling-houses, and to furnish the said building with sufficient steam power, mill gearing, and machinery, and not to allow the piece of land to be used for any other purpose than that of a cotton mill. And the indenture contained, amongst many other covenants and provisions, a covenant by *Stott*, "that he the said *William Stott*, his appointees, heirs, executors, administrators, or assigns, will from time to time, and at all times hereafter, make and pay full and reasonable compensation (the amount thereof to be determined, in case of difference, by two indifferent arbitrators, or their umpire, as in the ordinary case of settlement of disputes by arbitrators) for all damage, spoil, injury, or loss that shall or may from time to time be sustained by the owner, tenant, or occupier, or owners, tenants, or occupiers for the time being of the lands hereinbefore expressed to be hereby appointed and granted, or any part thereof, or of any erections or buildings for the time being thereupon, for or by reason, in respect, or in consequence of the searching for, getting, working, or carrying away any of the hereinbefore excepted mines, minerals, or substances lying within or under the same land, or any part thereof."

The mill was built on the piece of land, but was partly destroyed by fire in 1870. The company afterwards went into liquidation, and the Plaintiff, *H. Aspden*, in 1871, bought from the liquidator the piece of land, and reinstated the cotton mill.

The minerals reserved by the conveyance had been bought by the Defendants, *J. Seddon* and *T. H. Seddon*, and they had lately begun to work coal mines under or adjacent to the mill. These workings caused, as the Plaintiffs alleged, subsidences of the

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soil, causing cracks in the wall of the mill, and preventing the machinery from working properly; and, as the Plaintiffs alleged, the mill might be stopped at any moment. The Plaintiffs further alleged that it would take a large sum to repair the injury, and that the mill could never be restored to as good a state as it was, and that in such cases seven or eight years was the usual period allowed for subsidence. And the bill, which was filed by *Aspden* and his mortgagees, prayed for an account and payment of damages, and for an injunction to restrain the Defendants from working any coals or minerals so as to cause an injury to the Plaintiffs.

The Defendants denied that the subsidences complained of were occasioned by the working of their pits, and also averred that, under the terms of the deed of 1861, they had a right to work the coal as they thought fit, on paying damages.

The Master of the Rolls was of opinion that by the deed of 1861 the parties had contemplated and contracted that the grantor might take the minerals, and might take them in such a manner as would cause injury to the surface, making compensation; and His Honour dismissed the bill with costs (1).

(1) 1874. Nov. 16. WM (1874) 203

SIR G. JESSEL, M.R.:—

I must decide this case on my own view of the construction of the contract, for this I take to be the result of all the authorities cited to me. There is a rule of law which says, and reasonably says, that where a man grants to another a piece of land, reserving either the whole or a portion of the subsoil below a given depth, or the whole, or a particular portion of one kind of subsoil or minerals, there is a presumption of law that the grantee of the land is to keep it, and that the grantor is not by any act of his to cause the surface of the land to subside, as it is called, that is, to crack, break up, or be otherwise injured, in such a way as that the grantee cannot reasonably use it. That is clear from the nature of the thing granted. It is also said that the presumption is of such a character as that it is to influence the Court in construing the instrument of grant to this extent, that *primâ facie* the parties must be taken to intend the thing granted to be enjoyed as granted, that is, the surface is to be enjoyed without its being liable to be disturbed. All that seems to me to be perfectly reasonable and perfectly beyond controversy.

Then it is also conceded, and, as I read the authorities, clearly established, that the parties may, in granting a piece of land, agree to reserve the minerals to the grantor, and to allow him so to work them as to damage the surface of the land granted. It is a pure question of what the contract is, and if there is such a contract it is not repugnant to any rule of law. The question as to the existence of such a contract is a little influenced by the circumstance whether compensation is or is not to be made to the grantee, and of

The Plaintiffs appealed.

Mr. *Manisty*, Q.C., Mr. *Fry*, Q.C., and Mr. *Finch*, for the Plaintiffs:—

According to this decision the Defendants may utterly destroy

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course it is more reasonable to suppose that the parties entered into such a contract if you find that compensation is to be given to the grantee than where no such compensation is given; and accordingly, on looking at the cases, you will find that where there is no compensation, the Court has thought that to be a sort of additional presumption in favour of the grantee. That is not a presumption *de jure*, but only that sort of consideration which influences the Court in construing a difficult or an ambiguous instrument, namely, that what is reasonable is likely to have been the intention of the parties; and that again brings us back to the cardinal question of what is the construction of the contract?

Now, I will consider this contract first, independently of the cases, and I will then go through the cases to shew, as I think I can shew, that they do not interfere with the ordinary rules of construction beyond the presumption of law which I have mentioned, namely, that the thing granted is to be enjoyed as granted.

[His Honour then stated and commented on the terms of the deed, coming to the conclusion that both parties assumed that the grantor might carry on underground workings which might seriously injure the buildings to be erected, the grantee being compensated by damages. His Honour then continued:—] That being my view of the contract between the parties, it follows that the Plaintiff, being entitled to damages only, has no right to come into equity to get these damages. The right course, therefore, would be to dismiss the bill without prejudice to any action for damages, because there would be no equity then remaining in the bill. But as the bill claims damages, it would be right to put words into the decree, so as not to exclude the claim for damages.

The other point which I have to consider is, whether I am precluded by authority from so deciding? It appears to me that although the tendency of the authorities in time past went certainly to the extent of supposing it to be unlawful to contract that the surface might be let down, yet the modern authorities, when carefully examined, are all one way, and will be found to make the question depend on the construction of the deeds.

The first case cited was *Harris* v. *Ryding* (5 M. & W. 60), in which certain words in a document had to be construed. No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document; that is to say, I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction,

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the mill, but that cannot be inferred from a mere provision for payment of damages: *Harris* v. *Ryding* (1). A grantor cannot do anything repugnant to his grant, and destroy the thing granted.

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you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result especially in some cases of wills, has been remarkable. There is, first, document *A.*, and a Judge formed an opinion as to its construction. Then came document *B.*, and some other Judge has said that it differs very little from document *A.*—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document *C.*, and the Judge there compares it with document *B.*, and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner.

I will, therefore, say nothing as to what the document was in *Harris* v. *Ryding*. But the ground of the decision was, that there being a presumption that the lessee was to have a sufficient support, there was nothing in that instrument which, in the opinion of the Judges, shewed an intention that the lessor could interfere with that support.

The next case cited was *Smart* v. *Morton* (5 E. & B. 30). There, no doubt, the words were stronger in favour of the right to destroy or let down the surface; and it does appear to me, speaking with the greatest respect for so great a Judge as Lord *Campbell*, that he should not have looked at the grant in *Harris* v. *Ryding* in the way he did. He says: "We have compared it with the deed in *Harris* v. *Ryding*, as set out in the report of the case, and with a full copy of that deed which has been furnished to us; and for this purpose we can discover no substantial difference between them." It appears to me that the learned Judge did not there take the right course, which was to construe the deed first, and look at *Harris* v. *Ryding* afterwards, and not look at the deed in *Harris* v. *Ryding* with a view to construe the deed before him. But, however that may be, Lord *Campbell* clearly puts it throughout that the grantee may renounce, and that it is a question of construction, and nothing else.

The next case which was referred to was the case of *Hext* v. *Gill* (Law Rep. 7 Ch. 699), in which case there was no right to compensation reserved. That, no doubt, had some little bearing on the decision, and it was also a case in which there were none of the peculiarities to which I have referred. It was also a question of construction

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(1) 5 M. & W. 60.

That the intention was not to allow the destruction of the mill is clear from the covenants to keep the mill in repair. The grantor cannot render it impossible for the grantee to comply with the

upon which the Court above took a different view from that taken by the Court below. But Sir *G. Mellish* felt no difficulty on the subject, and said that if the owner sells the surface and reserves the minerals with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the Court may be able to say that such was clearly the intention of the parties; and the Court of Appeal, differing from the Vice-Chancellor, was of opinion that the grantor had not done so.

The next case cited was *Duke of Buccleuch* v. *Wakefield* (Law Rep. 4 H. L. 377), the decision of which Lord *Hatherley* puts most clearly on a question of the construction of a particular clause of a particular Act of Parliament, having reference, no doubt, to the existing state of things at the time when the Act passed.

The next case is the case of *Smith* v. *Darby* (Law Rep. 7 Q. B. 716). That was the case of a mining lease, and it has been said that a mining lease is a little more favourable for the lessee than a grant. That may be so, but it can make very slight difference if the wording is clear. That case, although a case of construction, has a considerable bearing on the present, and the reason is this: It was there again put by the Judges simply as a question of construction, but still the *ratio decidendi* was this, that if you find that the exact sort of damage was contemplated by the parties, and that compensation was agreed to be given for it, you must imply the right to do the thing, the power of doing which must have been contemplated in order to cause damage to be contemplated.

The last case which I was referred to was *Eadon* v. *Jeffcock* (Law Rep. 7 Ex. 379). That was, again, a case of a mining lease, and the only importance of the case is that it shews what is the rule laid down by the Court for ascertaining the rights of the parties. In all these cases the contract would regulate the obligations and the rights of the parties; but when the contract is ambiguous, there is a presumption of law that the surface is not to be interfered with, and that would turn the scale in the favour of the grantee of the surface. But being of opinion (to use the words of Baron *Cleasby* in that case) that, on a fair construing of the contract, having regard to the subject-matter, and having regard to the state of matters at the time when it was entered into, and of course giving to technical words their technical meaning—I say, construing the contract fairly, according to the rules of law—it is plain that the parties here did intend and contemplate that the grantor, who was entitled to take the minerals, should also be entitled to take them in such a manner as to cause injury to the surface, he making compensation. The Court must give effect to the contract between the parties, and, having arrived at that conclusion from the construction of the instrument, the Court is not compelled by any rule or presumption of law to say that the parties may not so contract.

That being my view of the case, the bill must be dismissed, and, of course, with costs, but without prejudice to any action at law.

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covenants imposed on him. The presumption is in favour of right to support: *Dugdale* v. *Robertson* (1).

The case of *Caledonian Railway Company* v. *Sprot* (2) is very similar. We say that the owner of the mines may do some incidental damage, but may not deliberately destroy the mill. A provision for compensation does not make an illegal act legal: *Roberts* v. *Haines* (3); *Hext* v. *Gill* (4). *Rowbotham* v. *Wilson* (5) was different.

[They also referred to *Eadon* v. *Jeffcock* (6), *Smith* v. *Darby* (7), and *Duke of Buccleuch* v. *Wakefield* (8).]

Mr. *Herschell*, Q.C., and Mr. *A. Brown* (Mr. *Chitty*, Q.C., with them), for the Respondents:—

It is clear that the intention of the parties was that the owner of the mines was not to be interfered with in working them, and was only to be liable in damages: *Buchanan* v. *Andrew* (9). As to the covenant to repair, it is clear that either we could not enforce it, or else we should have to pay with one hand what we received with the other. Under this deed we may dig the coal and do damage, not as doing wrong, but as our right. It is impossible to distinguish between proper working and improper working. How can a miner tell when he is taking coal which will do damage, and when he is taking it when it will not do damage? Such a contract is legal; and if these words have not this effect, no words can have it. The grantor is not derogating from his grant, but is keeping within it.

Mr. *Manisty*, in reply:—

Unless all right to support is expressly given up, it must remain; and such a giving up will not be implied. The meaning is, that the right to support is not given up; but that if in taking the coal and leaving supports some damage is done, it must be paid for. The provision as to compensation is not privative but cumulative.

(1) 3 K. & J. 695.
(2) 2 Macq. 449.
(3) 6 E. & B. 643.
(4) Law Rep. 7 Ch. 699.
(5) 8 H. L. C. 348.
(6) Law Rep. 7 Ex. 379.
(7) Ibid. 7 Q. B. 716.
(8) Ibid. 4 H. L. 377.
(9) Law Rep. 2 H. L., Sc. 286.

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April 23. SIR G. MELLISH, L.J., now delivered the judgment of the Court:—

This is an appeal from a decree of the Master of the Rolls, by which he held that the Plaintiffs were not entitled to the relief claimed by their bill. The sole question to be determined is, whether the Plaintiffs, as the owners of a certain cotton mill and other premises situate at *West Houghton*, in the county of *Lancaster*, are entitled to have their cotton mill and other premises supported by the subjacent and adjacent minerals of the Defendants, so as to entitle the Plaintiffs to an injunction to restrain the Defendants from getting their minerals in such a manner as to cause an injury to the Plaintiffs.

The question entirely depends upon the proper construction to be put upon an indenture of the 31st of December, 1861, by which the premises now belonging to the Plaintiffs were conveyed by the Defendants' predecessors in title to the Plaintiffs' predecessors in title, with a reservation of the minerals underneath. The material parts of the deed are these:—[His Lordship then stated them.]

Now, it is clear that as the land was conveyed by *Stott* to the trustee for the *West Houghton Cotton Manufacturing Company* for the express purpose that a cotton mill and other buildings might be erected on it, and for ever thereafter be kept in repair, as a security for the rent-charge reserved thereout, there was *primâ facie* the grant of a right to have not only the surface of the land in its natural state, but the buildings to be erected supported by the subjacent and adjacent minerals then belonging to *Stott*, and reserved to him by the deed. The case of *Caledonian Railway Company* v. *Sprott* (1) is a direct authority to this extent. Still it is equally clear that this *primâ facie* inference may be rebutted, and that if it appears from any express words in the deed, or by necessary intendment from anything contained in the deed, that it was not the intention of the parties that there should be any right to support, the Court is bound to hold that the Plaintiffs have failed to make out their case.

As laid down by Lord *Wensleydale* in *Rowbotham* v. *Wilson* (2), the rights of the grantor in the minerals must depend upon the

(1) 2 Macq. 449. 2 Jur. N. S. 623. (2) 8 H. L. C. 348. 6 Jur. N. S. 965.

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terms of the deed by which they are reserved when the surface is conveyed. Now, by the deed, all mines and seams of coal, ironstone, and other minerals are reserved to *Stott*, with full liberty, power, and authority for *Stott* and his lessees "to search for, get, win, take, cart and carry away the same, and sell or convert to his or their own use the said excepted mines, veins and seams of coal, cannel, and ironstone and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes." These words do certainly appear in very plain terms to give power to the mineral owner to remove any part of the minerals at his pleasure; but, nevertheless, we think that we are bound by the authorities to hold that these words are not by themselves sufficient to take away the surface-owner's right to support. If the sentence had stopped there, these words would be consistent with the construction that the mineral owner may take away every part of the minerals, provided he can do so without violating the surface-owner's right to support, but not otherwise, and some further words would be necessary to prove that the intention of the parties was that the mineral owner should be at liberty to take away the whole or any part of the minerals, notwithstanding he might thereby let down the surface or any buildings thereon. Accordingly the Respondents rely on the words which immediately follow in the deed as sufficient for this purpose. Those words are, "but without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof."

As by the express words of the reservation the mine-owner in working the mines is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which compensation is to be given must be damage to the buildings caused by the removal of the minerals reserved, and therefore it follows that a right to remove all the minerals, notwithstanding the buildings above might be thereby damaged, was one of the liberties reserved by the deed. In substance, the plain meaning of the whole reservation seems to us to be that the mine-owner is to be at liberty to

remove the whole or any part of the minerals at his pleasure, paying compensation to the surface-owner for any damage which may be thereby occasioned to the buildings of the surface-owner, which is equivalent to saying that he may remove the whole of the minerals, notwithstanding the buildings may be thereby damaged, subject to a liability to pay compensation. We do not think there is any other clause in the deed which really affects the question.

It was argued on the part of the Appellants, that the right to compensation was merely an additional remedy given to the surface-owner in case his buildings were damaged, but did not give the mine-owner a right to get the minerals in such a way as to cause damage to the buildings. It seems to us, however, clear that the compensation is given for damage caused by rightful acts which the deed makes lawful, and not for damage caused by wrongful acts. The exercise of any of the excepted liberties must surely apply to rightful acts, and not to wrongful acts, because it is absurd to suppose that a liberty is reserved to do wrongful acts. If liberty is reserved to do the act complained of, that reservation, as between the parties and those claiming under them, makes the act rightful.

Then it was suggested that the compensation was intended to apply to any small damage which might accidentally and against the will of the mine-owner be occasioned to the buildings, but that he was not justified in removing the minerals in a way which he must know would occasion damage to the buildings. We think it is impossible to make any such distinction. If the Plaintiffs have a right to have their buildings supported by the minerals underneath, and the buildings are damaged by the removal of the minerals, the right of the Plaintiffs is equally violated, whether the Defendants did or did not know that the removal of the minerals would damage the buildings. On the other hand, if the Plaintiffs have no right to support for their buildings as against the Defendants, the Defendants are entitled to remove the whole of the minerals, although they know that the buildings of the Plaintiffs will necessarily be thereby damaged.

We do not think it necessary to go minutely through the authorities, as the rule of law on the subject has been perfectly

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settled since the decision of the House of Lords in *Rowbotham* v. *Wilson* (1). It was said, however, that the case of *Caledonian Railway Company* v. *Sprot* (2) was a direct decision in the House of Lords in favour of the Plaintiffs. In that case, however, there was no clause in the conveyance similar to the clause before us, giving compensation to the railway company for any damage which might be occasioned to the railway company by the exercise of the liberties reserved, and there was nothing in the conveyance to rebut the presumption of a grant of a right of support to the railway. It is true that there was—not in the conveyance, but in the Act of Parliament relating to the railway company—a provision that the mineral-owners should not take away the minerals without giving to the company security for damage. But the House of Lords might well think that this clause in the Act was inserted for the purpose of giving an additional security to the railway company, because it was obvious that it did not mean that the mine-owner in getting the minerals was to be at liberty to damage the railway and stop the traffic, but that before he got the minerals he should give security that he would not do so. The construction put by the House of Lords on this clause is no authority as to the construction of the deed before us. On the other hand, we agree with the Master of the Rolls that the case of *Smith* v. *Darby* (3) is a strong authority in favour of the Defendants.

On the whole, we are of opinion that the decision of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Norris, Allens, & Carter*, agents for Messrs. *Darlington & Son, Wigan.*

Solicitors for the Defendants: Messrs. *Sharp, Parkers, & Co.*, agents for Mr. *T. F. Taylor, Wigan.*

(1) 8 H. L. C. 348. 6 Jur. N.S. 965 (2) 2 Macq. 449. 2 Jur. N.S.
(3) Law Rep. 7 Q. B. 716.

Ex parte LAMBTON. *In re* LINDSAY.

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1875
April 22, 29.

Bill of Exchange—Insolvency of Drawer and Acceptor—Doctrine of Ex parte Waring—Shipbuilding Contract—Bills given to pay Instalments of Purchase-money—Vendor's Lien for unpaid Purchase-money.

A contract for the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion and transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt, and the ship was completed by his trustee. The bill-holders having claimed a lien on the ship:—

Held (affirming the decision of the Chief Judge, reversing that of the County Court Judge), that the principle of *Ex parte Waring* (1) was not applicable, and that the bill-holders had no lien on the ship.

THIS was an appeal from a decision of the Chief Judge, reversing a decision of the Judge of the *Newcastle-upon-Tyne* County Court.

Edward Lindsay was an iron shipbuilder at *Newcastle.* On the 20th of October, 1873, he entered into a contract with *R. J. Marshall* and *D. T. Osborne,* who were in partnership as engineers at *South Shields,* to build an iron screw-steamer for them. This contract contained the following clauses:—

(1.) The ship was to be built according to a specification signed by both parties.

(2.) Fixed the dimensions.

(3.) "That if at any time the said *E. Lindsay* shall neglect or make default in any of the conditions of this contract, or in the event of the death, bankruptcy, or insolvency of the said

(1) 19 Ves. 345.

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E. Lindsay, or if not completed by the time specified, it shall be lawful then and thenceforth for the said *Marshall, Osborne, & Co.*, to cause any person or persons nominated for that purpose by them to enter upon and take possession of the said vessel, and of all materials, matters, or things prepared or provided, or in the course of preparation, for the said vessel, and to cause the said vessel to be completed by any person whom the said *Marshall, Osborne, & Co.* may see fit to employ in such completion, and at such place or places as the said *Marshall, Osborne, & Co.* shall choose to take the vessel to for that purpose, or in like manner to contract with some such person or persons for the completion of the work agreed to be done by the said *E. Lindsay*, and to employ such materials of and belonging to the said *E. Lindsay* as shall then be upon his premises, and which shall be considered fit and applicable for the purpose. And it shall be lawful for the said *Marshall, Osborne, & Co.* to pay such person or persons such sum or sums as they shall think fit or agree upon in that behalf, and it shall be lawful for the said *Marshall, Osborne, & Co.* to deduct such sum or sums of money as they may so pay from and out of the payments agreed by them to be made to the said *E. Lindsay*. And it is hereby further agreed that in the event of the amount of such payments exceeding in the aggregate the amount of the contract price agreed to be paid to the said *E. Lindsay*, the said *E. Lindsay* shall, on demand, pay such excess to the said *Marshall, Osborne, & Co.*, their heirs, executors, administrators, or assigns."

(4.) "That the said vessel and the materials prepared or provided, or in course of preparation, for the same, shall from the time of giving or paying the first instalment by the said *Marshall, Osborne, & Co.* to the said *E. Lindsay*, belong and are to be and shall be deemed, in every respect and for every and all purposes, to be the property of the said *Marshall, Osborne, & Co.* to the extent of their advances (whether in the builder's yard, or in the river, or in the graving dock after launching), and that, for the better identification of the said vessel, and for the protection of the said *Marshall, Osborne, & Co.*, the said *E. Lindsay* shall, immediately the keel of the said vessel is laid, mark thereon the initials of the said *Marshall, Osborne, & Co.*, as owners, and the

name of the said vessel, and as soon as practicable mark the name of the said vessel and the initials of the said *Marshall, Osborne, & Co.*, as owners thereof in legible characters, subject nevertheless to the builder's lien for any unpaid instalments."

(5.) "The price of the said vessel shall be £7600."

(6.) "The said vessel shall be launched on or before the 1st of August, 1874, and delivered to the purchasers, complete in hull and everything named in the specification, by the 1st of September, 1874, one day additional being allowed for every day *Marshall, Osborne, & Co.* keep the vessel at their works solely for their own use in putting in machinery, &c., and if not so completed by the said *E. Lindsay* on the 1st of September, then the said *E. Lindsay* shall, on demand, pay to the said *Marshall, Osborne, & Co.* £10 per week for every week beyond that date, or *Marshall, Osborne, & Co.* may, if they prefer it, deduct same off contract price."

And in consideration of these provisions *Marshall, Osborne, & Co.* agreed with *Lindsay* to pay for the vessel as follows:—

"When keel is laid	£100 cash, and	£500 by 6 months' bill.
„ framed		£1000 „ 6 „
„ plated	£200 cash, and	£2000 „ 4 „
„ launched	£200 „	£2000 „ 4 „
„ finished	Balance by 6 months' bill."	

"All bills given during construction to be retired by *Marshall, Osborne, & Co.* at completion and transfer."

The construction of the vessel was commenced and proceeded with by *Lindsay*. On the 9th of February, 1874, he drew upon *Marshall, Osborne, & Co.* two six months' bills for £200 and £300 respectively, which were expressed to be "value received at keel being laid for steamer." On the 1st of June, 1874, *Lindsay* drew two six months' bills on *Marshall, Osborne, & Co.* for £500 each, which were expressed to be "value received in iron screw-steamer now building." On the 9th of July, 1874, *Lindsay* drew two four months' bills on *Marshall, Osborne, & Co.* for £1000 and £500 respectively, which were expressed to be "value received in iron screw-steamer now building." £100 was paid by *Marshall, Osborne, & Co.* to *Lindsay* on the 12th of

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February, 1874, upon the keel of the vessel being laid, but this was the only cash payment made. All the bills were accepted by *Marshall, Osborne, & Co.*, and all of them (except the bill for £300), were discounted by *Lindsay* with Messrs. *Lambton & Co.*, bankers at *Newcastle*. On the 28th of July, 1874, *Osborne* died. The affairs of his firm were found to be embarrassed, and on the 31st of July *Marshall* filed a liquidation petition. His creditors, at their first meeting, resolved to accept a composition of 5*s.* in the pound, and this resolution was confirmed at the second meeting on the 18th of September. The liability in respect of the above bills of exchange was included in *Marshall's* statement, and the composition in respect of them was tendered to the bankers, but was refused by them. *Marshall*, on the 10th of October, 1874, gave notice to *Lindsay* of his intention to abandon the contract. The value of iron steamers had materially decreased since the agreement. On the 14th of August, 1874, *Lindsay* summoned a meeting of his creditors by a circular, in which he stated that he was unable to meet his engagements. This meeting was held on the 19th of August, but no arrangement was come to, and on the 20th of August a bankruptcy petition was presented against *Lindsay* by a creditor named *Procter*. On the 7th of September *Lindsay* was adjudicated a bankrupt. This adjudication was annulled by the Chief Judge on the 10th of November, and the proceedings under that petition were dropped. On the 18th of November, *Lindsay* filed a liquidation petition, and he was ultimately adjudicated a bankrupt on the 11th of December upon a petition presented by another creditor. From the 20th of August *Joseph Greener* had been in possession of *Lindsay's* estate, first as receiver and manager, and then as trustee under the first petition, and afterwards in the same characters under the liquidation petition, and the second bankruptcy petition. *Greener* was appointed trustee under the second bankruptcy petition on the 29th of December. At the time of the presentation of the first petition the vessel was lying in *Lindsay's* yard unfinished, and *Greener*, as receiver and manager, completed her ready for launching, and expended for this purpose £1067.

The bills having been dishonoured at maturity, the bankers claimed to be entitled to a lien on the vessel for the amount they

had paid thereon, and they applied to the County Court to enforce this claim. The Judge decided in favour of the claim, and ordered the trustee to sell the ship and to apply the proceeds of sale in paying, first his costs of the sale, next his advances to complete the ship, and then the sum due to the bankers in respect of the bills, with interest. *Lindsay's* trustee appealed, and the Chief Judge reversed the decision (1).

(1) 1875. Mar. 1.

SIR JAMES BACON, C.J. :—

After the very long argument I have heard it is satisfactory to be able to bring the case back to a very simple shape. *Lindsay* agreed to build a ship for *Marshall, Osborne, & Co.* for £7600. If he builds the ship they are to pay him £7600, and if they do not pay him £7600 the ship must remain his. That £7600 has not been paid. Then on what ground could any one but *Lindsay* claim to have any interest in the ship? It is one entire contract, and the substance of it is that which I have stated. The ship is, of course, proceeded with progressively. There is a stipulation for payment by way of advances as the ship proceeds. There is a stipulation that, to the extent of these advances, the purchasers shall have a property in the ship, but all that is overridden by this general universal stipulation: "Until you pay me £7600 the ship is not to be yours, nor any interest in it." The purchasers can claim nothing. Now it seems to me that this disposes of the question altogether, because unless that state of facts can be shaken *Ex parte Waring* (19 Ves. 345) cannot be resorted to, and no other principles of law need be resorted to. *Lindsay* is to build the ship, and as in the course of building expenses are incurred by him from day to day as the ship proceeds, advances are to be made to him by the purchasers. The agreement is so plain and so clear that it is impossible to have any doubt whatever on the subject. The 4th clause —that on which the learned Judge of the Court below most relied—has furnished to a great degree the argument on the part of the Respondents. [His Lordship referred to it.] There is also a stipulation as to the time within which the ship is to be completed, and the periods at which bills are to be given as the ship proceeds. And there is this express agreement—that all the bills given during the construction of the vessel are to be retired by *Marshall, Osborne, & Co.* at completion and transfer; so that, although bills were given before the completion, when the ship was completed, and when its delivery was asked for by the purchasers, the whole sum must have been paid to *Lindsay*. That is of the very essence of the contract. Then what takes place is this :—£100 is paid in cash, and at certain periods bills of exchange are given for other sums. These bills are discounted by the bankers in the most ordinary course of trade; no suggestion, no stipulation that the bills were on the security of the ship (although they do on their face mention the ship then building), but without the remotest intention on the part of anybody (discounter, drawer, or acceptor) that there should be any connection between the moneys advanced on the bills and the ship in course of building. It has been suggested, on the authority of *Ex parte Waring*, that the holders of these bills are entitled to a lien on

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Mr. *De Gex*, Q.C., and Mr. *Doria*, for the Appellant:—

The doctrine of *Ex parte Waring* (1) applies. Had there been no agreement the vendor would have been entitled to a lien on the ship. On what part of the ship I ask? Because it goes only to the extent of the purchasers' advances. That is clear from the contract. On what part of the ship, then, are they entitled to a lien? The ship is, as one entire substantive thing, to be subject to the builder's lien, notwithstanding that it is to belong to the purchasers to the extent of their advances. It is the property of the builder until he is paid. The bankers, on the authority of *Ex parte Waring*, as they say, contend that, inasmuch as there has been a double insolvency, and as there is a right of double proof upon these bills, they are entitled to apply the principle of *Ex parte Waring*. In my opinion, nothing can be more foreign to the principle of *Ex parte Waring* than the case now before me. *Ex parte Waring* proceeds, not upon any favour to the bill-holders, but upon the equitable rights subsisting between the parties to the bills. The holders are disregarded for all purposes of legal claims, but in order, as Lord *Eldon* said, and that is the very marrow and point of his decision, in order to work out the equity between the persons liable on the bills in a matter in which they are both interested, but in which neither of them can claim the property, it must be realised for the benefit of the holders, to whom both are under an obligation to pay a share. There the equity is clear, and if there is any balance it is to be proved for in the ordinary way by the bill-holders. What has that to do with this case? What equity subsists here? There are no equities, no legal rights, that the purchaser of the ship can claim until he has paid £7600. What can he do, although there is this stipulation in the 4th clause of the agreement? Can he sell any part of the ship thus said to belong to him? Could he interfere with what any assignee or contractor might do for the completion of the ship? The object and intention of that clause is perfectly obvious. It is to prevent the operation of the doctrine of order and disposition, and it is not unfrequent for such a stipulation to be made. It can, however, have no force with respect to the completion of the ship. As to the double insolvency, I quite agree that it is possible, as has been suggested to me, that assignees might lay their heads together and practise a fraud on persons holding bills. I have not the least reason to suppose that any such thing has been done here, and I find nothing whatever resembling it. What is the state of circumstances? Mr. *Marshall* becomes insolvent. He is unable to pay his debts, and he summons his creditors together, and they agree to take 5*s.* in the pound. The bill-holders are bound by that agreement to the extent of *Marshall's* debt, and his liability on the bills. What is his position? Here is a ship in course of building in respect of which a small part, less than one-half, of the agreement price has been paid. All that he could by any possibility do was to pay the difference, and insist on the ship being completed for him. But he had not the means of completing the ship by paying the difference between

(1) 19 Ves. 345.

ship for the amount of the bills. It is the bankers' money which has built the ship. This is like the ordinary case of the vendor of a bale of cotton drawing for it on the purchaser. The vendor gets the bill discounted. Both vendor and purchaser become insolvent, and the bill is not paid. In such a case it is a mere matter of course that the cotton shall pay the bill. The vendor's estate cannot have the goods because he has sold them; the purchaser's estate cannot have them because he has not paid for them. That is exactly the present case, and the rule in *Ex parte Waring* (1) was adopted as the only way of getting rid of the dead lock, and by it the bill-holders benefit. The doctrine applies directly there is a double insolvency; it is not necessary that there should be a bankruptcy: *Powles* v. *Hargreaves* (2). The assignees of a bankrupt cannot defeat this right of the bill-holders when it has once attached, nor can the debtor himself defeat it by compounding

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the sums advanced by him and the value of the ship. To relieve himself of the burden of this contract he gives notice to the builders that he abandons the contract. He was free by means of the composition resolutions, and he declines to have any responsibility whatever. Suppose it had been otherwise, and that his right and his interest in the contract, which, vested in him by the composition, had been sold by him, could it be said that the bankers, who had stipulated for nothing, and who knew of nothing with regard to the ship—for so I must take it to be—had a lien on it? In my opinion, *Ex parte Waring* has nothing whatever to do with this case. *Ex parte Waring* contains law which has never been questioned; it has been very often misunderstood I agree, but the principle of it has never been questioned. It has no sort of application to this case, and if it had, it would be directly in favour of the Appellant, because the equitable and legal rights arising out of the contract could not be arranged on any other terms than the parties resolve. I decline to bind myself by any opinion now as to what device may be resorted to, and with what success, with regard to *Ex parte Waring*. But in this case I find it clear and distinct that, after *Marshall's* insolvency, and when he abandoned the contract, the trustee in the bankruptcy of *Lindsay*, acting in the discharge of his simple duty, furnished money to complete the ship, and the ship being completed, it is a part of *Lindsay's* estate, not to be affected by any transaction arising out of the bills, and not to be affected by the principles of *Ex parte Waring*. But by reason of the original contract, if that had stood alone, and by reason further of the conduct of *Marshall*, who was able to deal with and dispose of his own property, the trustee of *Lindsay* is entitled to the proceeds of this ship, and there is no ground whatever for the claim which the bankers make as the holders of the bills. The order of the County Court must be discharged.

(1) 19 Ves. 345.

(2) 3 D. M. & G. 430.

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with his creditors. *Lindsay* was in a state of insolvency from the 14th of August, *Marshall* from the 31st of July, so that the equity had attached long before the notice to rescind was given. Our case is supported by *Bank of Ireland* v. *Perry* (1). The decision of the Chief Judge, that no property passed, is contrary to *Woods* v. *Russell* (2) and *Wood* v. *Bell* (3). The cases of *Bishop* v. *Shillito* (4) and *Barrow* v. *Coles* (5), referred to below on the other side, are inapplicable.

Mr. *Little*, Q.C., Mr. *Winslow*, Q.C., and Mr. *Colt*, for the trustee:—

Ex parte Waring (6) does not apply. The resolutions in *Marshall's* composition were completed on the 18th of September, so that he was competent to deal with his property, and on the 10th of October he gave notice to rescind.

[The LORD JUSTICE MELLISH:—How do you shew that that notice was accepted.]

There is no evidence of its having been in express terms accepted, but the conduct of the parties shews that they agreed to abandon the contract. The property in the ship did not pass to *Marshall, Osborne, & Co.*: *Mucklow* v. *Mangles* (7). But suppose it did, the interest of *Marshall, Osborne, & Co.* was over-ridden by the vendor's lien, which is expressly stipulated for by the contract. No one, therefore, can take the possession from *Lindsay's* trustee except by satisfying this lien: *Ex parte Chalmers* (8). There never were two bankruptcies or insolvencies subsisting together, for *Marshall* was discharged by his composition before *Lindsay's* petition was filed, so the state of circumstances necessary to bring *Ex parte Waring* into application never existed.

Mr. *De Gex*, in reply:—

In *Powles* v. *Hargreaves* (9) the representatives of one party disclaimed, and the Court held this to make no difference. The

(1) Law Rep. 7 Ex. 14.
(2) 5 B. & A. 942.
(3) 5 E. & B. 772; 6 E. & B. 355.
(4) 2 B. & A. 329, n.
(5) 3 Camp. 92.
(6) 19 Ves. 345.
(7) 1 Taunt. 318.
(8) Law Rep. 8 Ch. 290–293.
(9) 3 D. M. & G. 430.

notice by *Marshall* to rescind cannot, therefore, take away the equity of the bill-holders.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Appellant's contention in this case is really a *reductio ad absurdum* of the case of *Ex parte Waring* (1). The bill-holders never, either by contract or the conduct of anybody, acquired or had any charge whatever, direct or indirect, upon this thing which was to have been a ship, and which has now become a ship. They were bill-holders having a right against the acceptor, and having a right against the drawer. The bills came into existence, no doubt, in connection with a contract for building the ship, and in a certain state of circumstances, if there had been two insolvent estates under the administration of the Court of Chancery or the Court of Bankruptcy, or one estate under the Court of Bankruptcy and one estate under the Court of Chancery, it might have been the duty of the trustees of the one estate, as against the trustees of the other estate, or it might have been the duty of both sets of trustees, to have insisted upon the ship being sold, or that which was to be a ship being sold, for the purpose of taking up the bills. I say there might have been circumstances, which one might well conceive, in which such a right would have been acquired; but I cannot conceive that because in such a state of circumstances as that, merely in order to get rid of what is said to be a dead lock, a course is adopted in which accidentally and casually a benefit arises collaterally to the persons who were holding the bills, therefore the bill-holders, who never had a right by contract or otherwise with regard to the ship, could interfere with the right of the two parties, the vendor and the purchaser, or the assignees of the vendor, or the assignees of the purchaser, to make such arrangements as they otherwise could honestly and properly make with regard to that thing which is the subject of an executory contract. I cannot conceive that the holders of the bills would have a right to interfere in such a case as that. Mr. *Marshall* had a full right, if he thought it was for the benefit of himself or his creditors, to rescind or abandon the contract, and to say, "I can-

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not complete," and the other had a right to say, "We will accept your abandonment of the contract, and we will complete the ship for ourselves and take whatever remedies we may have." It seems to be an absolute right in the parties, on the one side, to make the abandonment, and on the other to accept it. There never was a moment of time at which Messrs. *Marshall & Osborne*, or their assignees, had a right to say, "Sell that unfinished chattel and apply the proceeds in the payment of the bills, because both you and I are liable to the holders of them." There was no such right, and Messrs. *Marshall & Osborne* could not, by becoming insolvent, alter the rights of the other party. The right of the other party was to say, "I will keep that ship until you have paid the purchase-money," and the bankers had no right to interfere with the contract which existed between Messrs. *Marshall & Osborne* and the vendor, or to enlarge the rights of Messrs. *Marshall & Osborne*, or to diminish the rights of the vendor. The Chief Judge was of opinion that the purchaser had no interest in the ship except a right to have it upon payment. It appears to me that it is altogether unnecessary to decide any point as to the exact nature of the property which was transferred from time to time, or the exact nature of the charge or lien which from time to time existed with regard to it. The substance of the contract was that the vendors, that is, the makers or the builders of the ship, were not to part with their whole interest, legal and equitable, except in exchange for full payment of the purchase-money, less the last instalment, and, therefore, they had a right to say to every one you shall not take that ship unless you pay the full purchase-money. I am of opinion, therefore, that the Chief Judge was perfectly right in the decision at which he arrived.

SIR G. MELLISH, L J. :—

I am of the same opinion. I confess that when this appeal was first opened I was a little alarmed at what appeared to be an expression of opinion on the part of the Chief Judge in Bankruptcy that no property had passed in this ship ; because for years I have always understood the law to be, since what was said by Lord *Tenterden* in the case of *Woods* v. *Russell* (1), that where

(1) 5 B. & A. 942.

a contract is made for building a ship and the price is to be paid by instalments in proportion to the amount of the work done upon the ship, that there is an inference that the property passes; because if any doubt were thrown upon that rule, it would, in my opinion, very seriously affect the rights of purchasers of ships to be built in the event of the insolvency of the vendor.

Now that this case comes to be understood, it really seems to me that it signifies very little whether the property had actually passed or not. It appears to me to be perfectly plain upon the construction of the contract, that either the property had passed to the purchaser subject to the vendor's lien remaining in the vendor for all the sums due and owing, except the last bill, or else the property remained in the vendor subject to a charge in favour of the purchaser for any sums that he might pay, and as an indemnity for him as against acceptance of bills, although I rather think myself, having regard to the express mention of the vendor's lien in the contract, that the true construction of the contract is, that the property passed subject to the vendor's lien, not only for the giving of the bills, but until the bills were paid. But although the property may have passed, I apprehend that the purchaser of a ship which is being built for him, is not entitled to possession of it except upon payment of the full amount, and if the purchaser becomes insolvent during the time that the ship is building, his merely becoming insolvent will not of itself dissolve the contract; but in the case of composition, which this is, where the property of the purchaser never becomes vested in any trustee, it is still for him to determine, or if he becomes bankrupt it is for his trustee to determine, whether it is for the benefit of his estate to have the contract completed, for it does not follow that because he is insolvent it may not be possible for the benefit of the estate to complete the contract. The ship might be very nearly completed, ships might have largely risen in value, and a ship which a man might have to pay £10,000 for, might be worth when completed £15,000. In that state of things, notwithstanding that the purchaser was insolvent, he would have no difficulty in borrowing money upon the ship with which to pay the full price; and in that case I apprehend that the vendor would be obliged to complete the contract, notwithstanding the

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insolvency of the purchaser. On the other hand, when the purchaser becomes insolvent, the contract might be a very onerous one. If the building of the ship were to go on, and it was to be completed, the cost to the estate would only be increased, and therefore it is that he may give notice at once, if he pleases, to the vendor that he abandons the contract, and in that case the vendor might take the property back to himself and prove for his damages. The effect of giving notice is, that it fixes the damages to the time when the notice is given.

It appears to me, that it is unnecessary to determine whether if *Marshall, Osborne, & Co.* had become bankrupt their trustee might have done that. In point of fact there was a composition which left the property in the ship in them, and I do not understand what possible right the bill-holders had to say that Messrs. *Marshall & Osborne* were not entitled to abandon their contract with the vendors, if that was most beneficial to them. Then it is said, that if here they gave notice to abandon, there was no sufficient evidence that *Lindsay* or his trustee accepted the abandonment. I think there is quite enough evidence, for in the absence of evidence to the contrary we may presume that a person accepted an offer which was for his benefit. *Lindsay's* first bankruptcy was annulled, he went on completing the ship, and when he was made bankrupt upon a subsequent occasion, then his trustee went on and completed the ship. For what purpose did the trustee go on and complete the ship? Was it for the benefit of Messrs. *Marshall & Osborne*, who had become insolvent, and who had given notice that they did not claim the ship, but had abandoned it. An unfinished ship is worth nothing, and it was necessary to complete it in order to get something for it; and I cannot conceive what possible right the bill-holders had to prevent the trustee from doing so for the benefit of *Lindsay's* estate. There are various reasons why the rule in *Ex parte Waring* (1) should not be applied to this case. One conclusive reason is, that at the time when this application was made, Messrs. *Marshall & Osborne* had ceased to have any interest whatever in the ship, which was exclusively the property of *Lindsay's* estate. *Ex parte Waring* only applies either where the property of the acceptor has been pledged

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with the drawer, or the property of the drawer has been pledged with the acceptor, and not where the property is exclusively the property of one of the parties. I think, therefore, that the decision of the Chief Judge was perfectly right, and that this appeal must be dismissed, and dismissed with costs.

Solicitors: Mr. *G. B. Wheeler*; Mr. *S. R. Hoyle.*

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[1873 S. 21.]

Garnishee Order—Order Nisi against Executors—Payment by Executors into Court in Administration Suit—Bankruptcy of Judgment Debtor—Charge of Judgment Creditor on the Fund—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61, 62—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16.

A judgment creditor obtained a garnishee order *nisi* under the *Common Law Procedure Act*, 1854, against the executors of *P.*, a debtor of the judgment debtor. At that time *P.*'s estate was being administered in the Court of Chancery, and after the service of the garnishee order the executors paid the personal estate in their hands into Court, and a sufficient sum to answer *P.*'s debt to the judgment debtor was carried to the separate account of the judgment debtor in the suit. The judgment debtor afterwards filed a petition for liquidation, and obtained an injunction restraining the judgment creditor from proceeding with his garnishee order. The trustee in the liquidation then applied in the suit for payment to him of the sum standing to the separate account of the judgment debtor:—

Held (reversing the decision of *Malins*, V.C.), that there was no debt owing to the judgment debtor in the hands of the executors of *P.* at the time when they were served with the garnishee order, within the meaning of the 61st and 62nd sections of the *Common Law Procedure Act*, 1854, and consequently the judgment creditor had no charge on the fund in Court.

Whether the application of the trustee ought not to have been made to the Court of Bankruptcy, *quære.*

Per Mellish, L.J.:—If a garnishee order is made against the executors of a debtor of the judgment debtor, it ought to appear on the face of it that they are sought to be charged as executors.

THIS was an appeal from an order of Vice-Chancellor *Malins* made on an adjourned summons.

On the 18th of December, 1872, *Charles Brown* recovered

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judgment against *George Brown* in the Court of Exchequer for £63 13*s.* 8*d.*, which judgment was still unsatisfied.

George Brown was a creditor of *A. R. Phelips*, and in the year 1873, after the death of *A. R. Phelips*, a suit was instituted by *R. Stevens*, one of his executors, for the administration of his estate, in which a decree was made on the 2nd of August, 1873.

On the 6th of May, 1874, the Chief Clerk made his certificate in the suit, allowing *George Brown's* claim against the estate of *A. R. Phelips* for £110, and £5 5*s.* costs.

On the 30th of May, 1874, *Charles Brown* obtained a garnishee order *nisi* under the *Common Law Procedure Act*, 1854, against *Richard Stevens* and *Maria Phelips*, who were the executors of *A. R. Phelips*, ordering that all debts owing or accruing from the said garnishees to the said judgment debtor should be attached to answer the judgment obtained by the judgment creditor against the said judgment debtor for £63 13*s.* 8*d.*, and ordering that the said garnishees should attend at the Judge's Chambers on the 9th of June, 1874, to shew cause why they should not pay the said judgment creditor the debt due from them to the said judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debt.

It did not appear on the face of the garnishee order that the garnishees were executors of *A. R. Phelips*, or of any other person, the order being made against them personally.

This order was served on the two executors on the 2nd and 4th of June respectively.

On the 6th of June an order was made in the suit on further consideration, in which it was ordered that the Plaintiff *R. Stevens* should pay into Court the sum of £72 3*s.*, which had been found due from him on the personal estate account, and that the executors should sell certain other parts of the personal estate of the testator, and pay the proceeds of such sale into Court, and that such proceeds, and also the sum of £72 3*s.*, should be applied in payment of the costs of the suit, and of the debts due from the testator, except the debt due to *G. Brown*, and that the amount of such last-mentioned debt, and the interest due thereon, should be carried over to an account to be intituled "the account of *George Brown*," with liberty to any person interested therein to apply.

In pursuance of this order the sum of £119 12*s.* was carried to the separate account of *George Brown.*

On the 8th of June *G. Brown* filed a petition for liquidation by arrangement, and on the same day he obtained an interim order from the Court of Bankruptcy for an injunction restraining the judgment creditor from taking further proceedings upon his judgment.

On the 9th of June, Mr. Justice *Brett*, sitting at Chambers, on being informed of the injunction in bankruptcy, adjourned the matter till the injunction had been disposed of. On the 19th of June the injunction was continued till further order, and on the 1st of August the creditors of *G. Brown* agreed to a liquidation, and *W. Brooks* was appointed trustee of his estate.

On the 9th of November the trustee took out a summons in the Vice-Chancellor's Chambers to obtain the payment to him of the sum standing to the account of *G. Brown*, which was opposed by the judgment creditor. The summons having been adjourned into Court, the Vice-Chancellor intimated his opinion in favour of the Respondent, but having regard to the decision of the Chief Judge in *Ex parte Greenway* (1), His Honour desired that the application should be renewed before the Lords Justices.

Mr. *W. F. Robinson*, for the trustee, in support of the summons:—

The question is *res judicata.* It was discussed when the injunction was continued till further order before the Registrar, who held that the creditor was not a secured creditor within the meaning of the *Bankruptcy Act*, 1869, sect. 16, sub-sect. 5, and no appeal has been brought from this decision. It is a question for the Court of Bankruptcy to decide, where the whole matter now is.

But assuming that the Court of Chancery has jurisdiction now to determine this matter, we say that the judgment creditor, by the garnishee order *nisi*, has obtained no charge on this fund. The order *nisi* is merely the commencement of proceedings, and the charge is not complete till the order is made absolute: *Holmes* v. *Tutton* (2), which was decided under the *Bankruptcy Act*, 1849; *Ex parte Greenway*, which was decided under the present Act. In both those cases a judgment creditor who had obtained a gar-

(1) Law Rep. 16 Eq. 619. (2) 5 E. & B. 65.

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nishee order *nisi* was held not to be a secured creditor within the meaning of the bankruptcy law. In the present case the creditor could never have got an absolute order against the garnishees, for the estate was being administered by the Court of Chancery, and they had paid all the money in their hands into Court. There was, therefore, no debt in their hands within the garnishee clauses of the *Common Law Procedure Act*, 1854 (1). The fund had been carried to the separate account of *G. Brown*, and no one but *G. Brown*, or those who represent him, are entitled to apply for it. It might have been taken out of Court by the trustee without serving the judgment creditor with notice of the application, as he has no stop order on the fund.

Mr. *Cookson*, for the judgment creditor:—

The Court of Bankruptcy, by granting an injunction, did not prejudice the rights of the judgment creditor. The injunction is merely for the protection of the debtor's estate: *Ex parte Rocke* (2). The question is therefore not *res judicata*. The Court of Chancery has full jurisdiction to deal with the matter. The garnishee order had the same effect on the fund as a stop order. With respect to the technical objection that the money was carried to the separate account of *G. Brown*, the order expressly reserved leave for all persons interested to apply; it was therefore the same as if it had been carried to the account of *G. Brown* and his incumbrancers.

(1) 17 & 18 Vict. c. 125, s. 61: "It shall be lawful for a Judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or a Master of the Court, as such Judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt."

Sect. 62: "Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the Judge shall direct, shall bind such debts in his hands."

(2) Law Rep. 6 Ch. 795.

The LORDS JUSTICES inquired whether both parties would waive any objection to the jurisdiction, and would consent to treat the question as if a summons had been taken out in Bankruptcy, and the whole matter were before the Court of Appeal in Bankruptcy.

Both parties having consented to this,

Mr. *Cookson* continued his argument:—

The judgment creditor in this case is "a creditor holding security" within the 12th section of the *Bankruptcy Act*, 1869, and a "secured creditor" within the 16th section, sub-sect. 5, of the same Act. In the last-mentioned section the words are "any creditor holding any mortgage, charge, or lien;" whereas in the 184th section of the *Bankruptcy Consolidation Act*, 1849, the words were "mortgage or lien;" the word "charge" did not occur, and it was on this ground that the judgment in *Holmes* v. *Tutton* (1) proceeded. In *Emanuel* v. *Bridger* (2) it has been expressly decided that the service of a garnishee order is "a charge" on the bankrupt's estate, and is equivalent to an actual seizure by the sheriff. It is true that in that case the garnishee order had been made absolute, but it is clear from the reasoning of the Judges that if it had been otherwise their decision would have been the same. In *Ex parte Greenway* (3) the garnishee order was made by the Tolzey Court at *Bristol*, not under the *Common Law Procedure Act*. Although the order is called an order *nisi*, it is in fact absolute against the debt; it is only conditional as against the garnishees personally. In the present case it was impossible for the judgment creditor to get an order absolute against the executors, because they had no longer the fund in their hands; but the charge on the fund remains. If we cannot proceed with our remedy at law, that is no reason why the Court of Chancery or Bankruptcy should not enforce our charge. It is true that at the time when the garnishee order was made a decree for administration had been made, but the personal estate was still in the hands of the executors; they had to be served with all proceedings, and

(1) 5 E. & B. 65. (2) Law Rep. 9 Q. B. 286.
(3) Law Rep. 16 Eq. 619.

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all sales of personal estate had to be made by them; and by means of the order on further consideration we are able to trace this fund, and identify it as part of the personal estate which was in their hands when they were served with the garnishee order.

SIR G. MELLISH, L.J.:—

We must decide the question in this case on the understanding that no objection is taken by either party to the matter being heard in Chancery and not in Bankruptcy. That being so, the question to be determined is, whether a garnishee order *nisi* obtained by the Respondent against *R. Stevens* and *Maria Phelips*, the executors of *A. R. Phelips*, can be enforced by ordering that a sum of money which has been paid into the Court of Chancery in a suit for the administration of the estate of *A. R. Phelips*, to meet a debt due to *G. Brown*, the judgment debtor, shall be paid to *Charles Brown*, the judgment creditor.

The question principally argued before us was whether a garnishee order *nisi*, according to the true construction of the *Bankruptcy Act*, 1869, binds a debt from the time of serving the order, so as to make a distinction between the present Act and the Bankruptcy Act, 1849, under which it was held, according to the authority of *Holmes* v. *Tutton* (1), that a garnishee order was not available against the estate of a bankrupt where the bankruptcy commenced before the order absolute was obtained. It is not necessary that we should directly decide this point, though I do not differ at all from the opinion of the Judges expressed in *Emanuel* v. *Bridger* (2), and I think that no distinction can be drawn between that case and the present on the ground that in that case the order was absolute and in this it was *nisi* only. But here the question turns upon the 61st and 62nd sections of the *Common Law Procedure Act*, 1854, and we have to decide whether, after a suit for administration has been instituted in the Court of Chancery, and the whole of the personal estate of a testator has been taken possession of by that Court, and the executors have been discharged from all liability to pay the testator's debts, a garnishee order can be obtained so as to bind the funds in the

(1) 5 E. & B. 65. (2) Law Rep. 9 Q. B. 286.

hands of the Court. [His Lordship read the 61st and 62nd sections of the Act.] The only question, then, is this: Is the debt in the hands of the executors after they have paid the whole sum into the Court of Chancery? It is obvious that no proceedings at law could be taken against the executors under these circumstances. It is impossible to suppose that a Common Law Court would order an execution to issue against the executors to compel them to pay the money over again; and if such an execution were issued, the Court of Chancery would protect them against it. The only question, therefore, is whether the Court of Chancery will assist the judgment creditor to obtain the fund in Court. I cannot see on what ground it should do so. The Act says that the order shall bind "such debts in his hands," but this is not in the hands of the garnishees. It has been removed out of their hands, and is in the hands of the Court of Chancery. The words of the section, therefore, do not apply: and I see no reason why those words should be extended beyond their natural meaning. If it were otherwise, it would be necessary in each case to examine out of what fund the money paid into Court had arisen. It might have arisen from the sale of real estate, or it might have been the produce of outstanding estate which had never come into the executors' hands at all. I know of no authority for saying that a garnishee order can be enforced by the Court of Chancery: it is entirely a process of the Courts of Common Law.

16 Ch D 382
18 Ch D 655

Another objection in this case, of a more technical nature, is that, assuming that a garnishee order can be obtained against executors in respect of a debt due from their testator, I think it ought to shew on the face of it that it is directed to them as executors and not personally. In the present case the order professes to charge them personally. An order must be made according to the summons. There will be no costs of this appeal.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitors: Mr. *H. W. Mackreth;* Mr. *A. Beddall.*

L. C.
and L. J. J.

1875

Jan. 16;
March 1, 2, 13;
April 15;
May 28.

POWELL *v.* ELLIOT.

[1866 P. 153]

Specific Performance—Compensation—Calculation—Income—Price—Partial Failure of Case—Costs on further Consideration.

In suits as to the specific performance of a contract to purchase large colliery works, the purchasers alleged as a defence misrepresentation by the vendors as to the value. As to several allegations the purchasers were held to have failed, and specific performance was decreed, but with compensation to the purchasers in respect of an alleged misrepresentation as to the amount of stores consumed in the collieries, and a consequent excess in the statement of income. An inquiry was directed as to such compensation, and it was found that there was a large excess in the statement of income beyond its true amount:—

Held, that the purchasers were entitled to a deduction from their purchase-money bearing the same proportion to the whole purchase-money as the excess bore to the income stated:

Held, that as no direction as to costs was given by the original decree in the suits, and that as the purchasers were held to be entitled to a considerable abatement, the vendors must pay the costs of the suits, and could not on the hearing on further consideration be relieved from payment of any part of the costs on account of the failure of the purchasers as to parts of their case on the original hearing.

Order of *Bacon*, V.C., affirmed with a variation.

THE suit of *Powell* v. *Elliot* was instituted to enforce specific performance of a contract to purchase extensive colliery works, the defence to which was that the vendors had in several respects misrepresented the value of the works. A cross suit was instituted by the purchasers to have the contract rescinded on the ground of the same misrepresentations. A decree was made in both suits for specific performance of the contract, with an abatement from the purchase-money, as to which a reference was directed. The Vice-Chancellor *Bacon* found that the abatement ought to be £72,564. From this finding the vendors appealed.

The facts of these suits appear sufficiently for the purposes of this report, from the judgment delivered by the Lord Chancellor.

Mr. *Fry*, Q.C., Mr. *Cohen*, Q.C., and Mr. *H. A. Giffard*, were for the Appellants, the vendors.

Mr. *Kay*, Q.C., Mr. *Bidder*, Q.C., and Mr. *W. F. Robinson*, were for the Respondents, the purchasers.

The case was argued on several days until the 15th of April, when judgment was reserved.

May 28. LORD CAIRNS, L.C., now delivered the judgment of the Court:—

The original suit was for the specific performance of a contract for the sale of extensive mineral properties and coal works for a very large sum of money, viz., £365,000. The Defendants, the purchasers, by their answer and afterwards by their cross bill, alleged that there had been substantial misrepresentations of matters of fact which were or ought to have been in the knowledge of the vendors, and in respect of which the purchasers claimed to be entitled either to have the contract rescinded, or to have compensation out of the purchase-money.

On the hearing before the Vice-Chancellor *James*, he arrived at the conclusion that in respect of one matter, the consumption of stores in working the collieries, the purchasers had made out their contention; and that, having regard to the circumstances of the case, and the great difficulty of laying down any principle on which compensation could be estimated, the only available course was to avoid the contract. At the same time, from the fact that possession had been taken, and the works had been prosecuted on an enormous scale, it was obvious that the consequential directions would involve investigations scarcely, if at all, less difficult than those which would have to be made in solving the problem as to what would be the proper compensation.

On the re-hearing of the cases before the Lord Chancellor (Lord *Hatherley*), His Lordship was of opinion that if the purchasers were entitled to anything, they were entitled, not to rescission, but to compensation. He was further of opinion that the testimony produced, particularly by reason of the absence of certain evidence in the power of the purchasers and not produced by them, was not sufficiently satisfactory to enable him to concur in the finding of the Vice-Chancellor with respect to the stores, and that it was necessary to have the matter further and more fully investigated.

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The inquiry and direction contained in the decree of the Lord Chancellor are as follows:—

"An inquiry whether the amount in value of the stores used by the Plaintiffs in the first suit and their partner, the late *T. Powell*, for the thirteen lunar months of the year 1863 (commencing and terminating as in the pleadings mentioned), at the several steam coal collieries sold by them to the Defendants, in working and placing in waggons the coals raised at the same collieries during the same period exceeded to any and what amount the value set forth in that behalf in the cost-book for that year; and if so, what allowance ought to be made to the Defendants by way of abatement from the purchase-money in respect of the increased costs of working the coal for that year over the sum represented by the Plaintiffs to be the cost-price per ton for working and placing in waggons the coal worked in the said collieries. And it is ordered that such sum or sums (if any) as shall be allowed to the said Defendants on the said inquiries be deducted from the purchase-money agreed to be paid by them for the purchase of the said collieries."

That inquiry has been accordingly prosecuted in the chambers of the Vice-Chancellor *Bacon*. The witnesses whose absence had been commented on by the Lord Chancellor were produced, further evidence was taken, and in the result the Vice-Chancellor came to the conclusion that the purchasers were entitled to a compensation amounting to £72,564, with interest thereon at the rate of 5 per cent. from the 1st day of January, 1864.

From that finding there has been an appeal to us. On the hearing of this appeal it was strongly urged on behalf of the vendors that the evidence was substantially in the same state as it was before the Lord Chancellor, and that the burthen of proof being on the purchasers, they had still failed to bring satisfactory evidence or sufficient affirmative evidence that the value of stores consumed in working the coal and putting it into waggons was substantially or seriously in excess of that which was represented.

We are unable to concur in that view. What the purchasers shewed was, that there were store ledgers kept at the head office shewing all the stores sent up to the several coal works, and that

the difference between the stores so appearing to have been sent for consumption, and those which were represented by the vendors to have been consumed, amounted annually to several thousand pounds. The accounts kept at the head office are very strong *primâ facie* evidence as to the actual consumption, unless it should be shewn, or it could be reasonably presumed, either that the stores had been applied to some other purpose than the working coal and putting it into waggons, or that they had accumulated at the collieries.

The purchasers, to supply the defect which the Lord Chancellor had found in the original evidence, produced evidence that there had been no such other consumption, and that there had been no such accumulation.

It is impossible, therefore, in our judgment, to treat the matter as having been in any sense, or in any sense available for the present purposes, *res judicata* by the Lord Chancellor.

The Vice-Chancellor *Bacon* was consequently quite right in treating the questions of fact as to consumption of the stores as depending upon and to be determined by himself on the whole evidence as it now stands, and as if no opinion had been pronounced by the former Vice-Chancellor or the Lord Chancellor on the evidence as it originally stood; and we are bound so to treat them for the purposes of this re-hearing.

[The colliery accounts appeared to be the accounts which the vendors took in making their estimate as to the consumption of stores and in the consequent estimate of net profits, and His Lordship gave the reasons which led the Court to come to the conclusion that the accounts given in the ledgers must be preferred to the colliery accounts.]

The Vice-Chancellor therefore was, we think, right in charging the vendors with the quantities appearing in the ledgers, leaving them to discharge themselves by evidence as to any portion of them. And he, holding that they had not discharged themselves of any portion, charged them with £11,164 as the difference between the ledgers and the representations made by the vendors, and he assessed the compensation as to this difference at £72,564, being six and a half years' purchase, or six and a half times the amount of that difference.

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The counsel for the Appellants contend that they have succeeded in shewing by positive evidence that there ought in all fairness to be in respect of many specified items a great deduction from this difference, and that even on that difference the Vice-Chancellor has miscarried in the principle of calculation on which he has converted it into capital.

Both parties have requested us, if we should think that there has been any miscarriage in these respects, or either of them, not to confine ourselves to mere declarations or directions, and not to send the matter back to Chambers, but to save them from any further continuance of the litigation, which has been harassing and protracted, and ourselves to assess the amount of compensation as if we were a jury.

We are of opinion that the Vice-Chancellor has assessed the compensation too high. We shall indicate briefly but generally the matters in respect of which we think the Appellants entitled to a considerable abatement from the finding of the Vice-Chancellor.

[His Lordship then gave reasons for making certain deductions from the sum charged for stores, coming to the conclusion that the Court would arrive at the substantial truth of the case if the difference in the annual consumption of stores was taken in round numbers at £9500 instead of £11,164. The factor 6½ adopted by the Vice-Chancellor appeared to have been taken from the calculations supplied by the vendors, shewing a net income of £66,049, and allowing to the purchasers interest at 15 per cent., on which basis, after allowing for the expiration of the colliery leases, the vendors brought out a value of £423,096. His Lordship then continued:—]

But the actual price given was not £423,096, but £365,000 only. The statement of the annual profits actually realized for the past year, and amounting in the aggregate to £66,049, was a statement of a fact for which the vendors were responsible; but the statement that collieries producing such profits were worth £423,096, and the calculations by which such value was arrived at, were mere matters of opinion and judgment, as to which the parties had to form, and did form, their own conclusion.

The purchasers might have thought, and apparently did think,

that 15 per cent. was not enough in such a concern, and that they would not embark in it unless tempted by 20 per cent.

It was admitted by the counsel for the Respondents that if it were the case of a sale of land stated to produce £1000 a year, and that the vendors had said it was worth thirty years' purchase, but they were willing to take twenty-eight, then any compensation for deficient rental would be given, not on the thirty years, but on the twenty-eight years.

It was, however, contended that the cases were not analogous, that the cost of working was in the nature of a first fixed charge on the property, that in a property of this kind every additional £1000 profit was worth much more than its proportional value, because the profit, the difference between the cost of producing and the realized product, was the margin of protection and indemnity against the possible loss which might in the contingencies of trade arise. If that were followed out logically it would lead, not to a multiplication by $6\frac{1}{2}$, but to ascertaining what the value would be of fixed annuities for the respective portions of the excess of working charges attributable to the different collieries for the respective residues of their terms, which would probably give the purchasers the collieries for little or nothing beyond the actual value of the plant. Such a conclusion would be a *reductio ad absurdum*.

The common experience of mankind is against it. It is obvious that the larger the profit in any work or commercial undertaking where there is no monopoly, the greater is the danger of new competitors and increased competition, and accordingly we do not find that shares paying a dividend of 20 per cent. or 10 per cent. realize in the one case more than four times or in the other case more than twice as much as those paying a dividend of 5 per cent. And in this particular case we find that collieries making 2*s.* 6*d.* a ton profit and collieries making 1*s.* 9*d.* profit were valued in the ratio of those sums, and it never appears to have entered into the minds of the experienced and skilful valuers that the collieries with the larger margin of profit were worth proportionably more than the others.

We are therefore of opinion that we must take the sum of £365,000 as the value ascertained by the bargain itself; and

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deducting from that sum the small sums of £2616 and £710 (taken as the present value of the future auction value of the plant to be realized at the abandonment of the collieries), £361,674 is left as the capitalized value of £66,049, the annual profits stated. The profit was over-stated in respect of stores, the only matter before us, to the extent of £9500, and we are unable to find any other mode of assessing the capital deduction to be made in respect of such over-statement than that of working out the simple rule of three sum; as £66,049 is to £361,674, so is £9500 to the sum to be deducted. This gives £52,020 as the sum to be deducted, to which will have to be added interest at 5 per cent. from the 1st day of January, 1864.

Another ground of the appeal before us was in respect of the costs. The Vice-Chancellor has given the purchasers all their costs, except the costs of the re-hearing before the Lord Chancellor.

It is contended that this is erroneous, and that, having regard to the numerous other allegations of error made by the purchasers, said to amount in some respects to a charge of fraud, there ought to be some division of the costs.

We cannot accede to that view. If by reason of charges of fraud or the failure as to parts of the case, the vendors were, at all events, entitled to any costs, or to be relieved from any costs, the proper time to make such an order was at the hearing, and is not on the further consideration.

The substance of the case between the parties was this: the vendors insisted that they were entitled to specific performance without any abatement; the purchasers insisted that they were entitled in the alternative to either rescission or abatement; and for the determination of that issue it was considered at the hearing necessary to have the matter further inquired into. The result of that inquiry has been to establish that the purchasers are entitled to a very substantial abatement, and there being no distinction as to costs made by the decree, the Vice-Chancellor has, in our opinion, properly made the costs abide the event, and there will therefore be no alteration of his order in that respect.

Solicitors for the Vendors: Messrs. *T. White & Sons.*
Solicitors for the Purchasers: Messrs. *Williamson, Hill, & Co.*

BATSTONE *v.* SALTER.

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1875

May 28.

[1873 B. 150.]

Advancement—Transfer of Stock into joint Names of Transferor, her Daughter and her Daughter's Husband.

Stock which had been acquired by a lady as the survivor of her husband, who had transferred it into their joint names, was transferred by her into the names of herself, her daughter, who had recently married, and her daughter's husband; and the dividends of the stock were enjoyed by the transferor during her life. The daughter predeceased her mother, and the son-in-law survived them both :—

Held (affirming the decision of *Hall*, V.C.), that there was no resulting trust, and that the son-in-law was entitled to the fund.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

On the 15th of September, 1864, *Mary Ann Wakeford* sold out £100 consols, part of a larger sum of £1000 consols standing in her name, and applied the proceeds to her own use, and transferred the balance of £900 consols into the joint names of herself, *Margaret Salter* her daughter, and *Henry Salter*, who had married her daughter about a year previously. The sum of £1000 consols had formerly belonged to Mrs. *Wakeford's* husband, who had transferred it into the joint names of himself and his wife; and Mrs. *Wakeford* having survived him, had become entitled to it absolutely.

Mrs. *Wakeford* was at the time of the transfer of the sum of £900 sixty-nine years of age, and very infirm; but she received the dividends on the stock for three or four years afterwards, and then *Henry Salter* received them till the time of her death, and accounted for them to her. During the last seven years of her life *Henry Salter* managed the rest of the property of Mrs. *Wakeford*, and paid the income of it to her.

Margaret Salter died without issue on the 4th of July, 1869.

Mrs. *Wakeford* died on the 9th of November, 1871, having by her will, which was made in 1868, appointed the Plaintiff her executor. At her death the sum of £900 consols stood in her name and that of *Henry Salter*. The executor, by the direction

(1) Law Rep. 19 Eq. 250.

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of Vice-Chancellor *Wickens*, instituted the present suit against *H. Salter*, praying that he might be declared a trustee of the fund for the residuary legatees named in the will.

The Defendant stated in his answer that the intention of the transferor was to benefit him, but produced no evidence to support the statement. The Plaintiff gave some evidence tending to shew that the testatrix transferred the stock to enable her son-in-law to receive the dividends for her.

The Vice-Chancellor was of opinion that the Defendant was entitled to the fund, and dismissed the bill with costs. From this decision the Plaintiff appealed.

Mr. *Dickinson*, Q.C., and Mr. *Simmonds*, for the Plaintiff:—

There is no conclusive contemporaneous evidence of the intention of the testatrix in this case, and the Court must therefore judge from the nature of the transaction. It is probable that the testatrix was desirous of saving herself the trouble of receiving the dividends; but without relying on that, we say that it is the settled law of this Court that it is not sufficient, in the case of a voluntary transfer like the present, that there is a probability that a benefit was intended to the donee; but the donee must be some one to whom the donor stands *in loco parentis*, otherwise there is a resulting trust for the donor. There has been no case in which a son-in-law has been held such a person; and the Court has always declined to extend the rule to those not strictly within it: *Stock* v. *McAvoy* (1); *George* v. *Howard* (2); *Kingdon* v. *Bridges* (3); *Dumper* v. *Dumper* (4).

[THE LORD CHANCELLOR:—The law regards the husband and wife as one person. The *Bank of England* will not allow stock to be transferred into the name of a married woman without her husband, except under the *Married Women's Property Act*, 1870.]

It may be that in the present case, if the daughter had survived her mother, there would have been a presumption in her favour, and she would have taken the fund as an advancement; but her equity ceased on her death before her mother. This would certainly have been the case if the fund had stood in the

(1) Law Rep. 15 Eq. 55.
(2) 7 Price, 646.
(3) 2 Vern. 67.
(4) 3 Giff. 583.

names of the mother and daughter simply; and how can it be otherwise when the husband's name is added merely to avoid a legal difficulty? He has no equity himself, and can only claim as representing his wife.

The rule of the Court is, that either the transferee must be absolute owner, or else there is a resulting trust. In this case the Court is asked to speculate as to the nature of the interest which the two transferees were intended to take.

Mr. *Ince*, for the Defendant, was not called on.

LORD CAIRNS, L.C.:—

I am not able to arrive at a conclusion different from that of the Vice-Chancellor. The transfer in this case was made by Mrs. *Wakeford* in September, 1864. It appears that about a year previously the Defendant *Salter* had married a daughter of Mrs. *Wakeford*. The way in which Mrs. *Wakeford* herself had become entitled to the fund is somewhat singular. The stock had, during the life of her husband, been transferred by him into the joint names of himself and his wife, and she having survived him had become absolutely entitled to it by survivorship. So that she is proved to have been acquainted with the operation of a transfer into joint names, a circumstance which probably has not occurred in any previous case. With this knowledge she transfers £900 into the joint names of herself, her daughter, and her daughter's husband. Let it be supposed that her desire was to transfer the stock in such a way as to be an endowment for her daughter after her own death. In what way could she do it? She could not transfer it into the name of her daughter—at least, without deceiving the Bank of *England* as to the fact of her daughter being a married woman. She therefore was obliged to make the endowment in this way: namely, to transfer it into the names of her daughter and her daughter's husband, and to secure her own power over it during her life by putting in her own name jointly with theirs. Now if it be true that a resulting trust only arises where there is no other explanation of the transaction, here you have a reasonable explanation of the transaction in the fact that there was a daughter to be

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endowed, and that she could only be endowed by this form of transfer. Whatever presumption there is in favour of an unmarried daughter in the case of a transfer to her, the same presumption arises in this case, where the transfer was to a married daughter and her husband. Then, if the object of the donor at the time when the transfer is made is ascertained, it can make no difference whether the daughter and her husband survived the mother, or, as in this case, the husband only survived the mother. I am of opinion, therefore, that the decision of the Vice-Chancellor was right, and the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitors for the Plaintiff: Messrs. *Clapham & Fitch.*
Solicitors for the Defendant: Messrs. *Hird & Son.*

RIPLEY *v.* GREAT NORTHERN RAILWAY COMPANY.

L. JJ.
1875
April 28.

[1874 R. 25.]

8 *Vict. c.* 18, *s.* 63—*Compensation—Injuriously affected—Other Lands—Prospective Value—Umpire—Evidence.*

A railway company took land on which cotton-mills would probably have been built; the owner had other land on which he had built a reservoir from which water might be supplied to such cotton-mills when built. In proceeding under the *Lands Clauses Act* to ascertain the compensation, the umpire received evidence as to the profits which might have been derived from supplying water to the mills when built, and awarded compensation for the loss of those prospective profits:—

Held (affirming the decree of the Master of the Rolls), that the umpire was right in receiving the evidence and in awarding such compensation.

THE *Great Northern Railway Company* being by one of their Acts empowered to take certain lands belonging to the Plaintiff, *H. W. Ripley*, gave him the usual notice; and being unable to agree as to the price, they entered into a formal agreement to refer it to arbitrators to determine the amount of purchase-money and compensation: the provisions of the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, were to be deemed a part of the agreement; the Plaintiff agreed to make out a good title and convey, and the company agreed on a good title being shewn, and the conveyance being executed, to pay the price determined as aforesaid; in the meantime the company were to be at liberty to take possession.

The land of the Plaintiff consisted in part of building land (which the company proposed to take), and in part of a reservoir which he had built in order to supply with water a part of the town of *Bradford*. It had, however, been decided that the *Bradford Waterworks Act* prevented him from supplying any part of the town except his own land and the mills or buildings which might be built thereon. He claimed before the arbitrators and umpire £14,655 for the land taken, and £7475 for the prospective profit to be derived by supplying from his reservoir (which the company did not propose to take) water to the mills which might be built on his other land.

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The company objected that this head of damage was too remote, and that the umpire (before whom the questions came, the arbitrators having differed) could not receive the evidence; the umpire, however, decided to receive the evidence, allowing the company the benefit of the objection. The umpire finally awarded £15,448 for purchase-money and damage within the meaning of the Acts.

The company applied to the Court of Queen's Bench for a rule *nisi* to set aside the award, on the ground that the umpire had awarded compensation for the loss of prospective profits of supplying water; but the Court refused to grant the rule, being apparently of opinion that the question ought to be decided on an action to be brought by the Plaintiff for his purchase-money.

The Plaintiff then filed the bill in this suit for specific performance of the contract.

The company by their answer said that the umpire had during the reference admitted and had acted on evidence as to prospective profits, and had allowed the whole or a great part of the sum claimed by the Plaintiff on that head; they further said that the umpire had no power to award such compensation, and that the award was therefore bad.

At the hearing before the Master of the Rolls, Mr. *Wills*, Q.C., the umpire, was examined, and stated that he had awarded £3153 in respect of the reservoir, being of opinion that the land on which it stood was valueless for any other purpose, but that the other land would in time inevitably be covered with mills which would be supplied from the reservoir; and that if Mr. *Ripley* did not get this sum he would be that sum out of pocket, if his other land was taken from him and paid for.

The Master of the Rolls made a decree for specific performance.

The company appealed. On the appeal the evidence of Mr. *Wills* and the shorthand writer's notes of the proceedings in the arbitration were referred to.

Mr. *Hawkins*, Q.C., and Mr. *Fry*, Q.C. (Mr. *Speed* with them), for the Appellants:—

There are many things which may injuriously affect land, for which things the owner can get no compensation; as, for instance,

depriving him of his view. The land taken has been, no doubt, valued, and the full prospective value on account of the mills to be built has been allowed, and no addition ought to be made for the profits on the water to be supplied. In *Reg.* v. *Metropolitan Board of Works* (1) the question was whether the land taken was injuriously affected. The reservoirs ought only to be valued as so much land. It is possible that their value as reservoirs may be diminished because the company has taken this other land, but that is not a ground for compensation: *Chamberlain* v. *West End of London, &c., Railway Company* (2); *Ricket* v. *Metropolitan Railway Company* (3). What the umpire has valued is not the damage done to the land taken, but the possible profits on other land: *Duke of Buccleuch* v. *Metropolitan Board of Works* (4). The destruction of a neighbourhood or the driving away customers is no ground for compensation. The award cannot stand if the umpire has improperly received evidence on these heads, and if he had before him claims for lands *A.*, *B.*, and *C.*, when he could award compensation in respect of *C.* only.

Mr. *Southgate*, Q.C., and Mr. *T. C. Wright*, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L.J.:—

The only reason for bringing this appeal must be that the Appellants are a wealthy railway company disposed to fight everything in every way they can. It appears to me that the decision of the Master of the Rolls is in accordance with every principle of this Court and of the Courts of Common Law.

Mr. *Ripley* had some of his land taken from him. He was entitled to have compensation awarded for that land. The Act of Parliament (8 Vict. c. 18, s. 63) says that in estimating that compensation the jury or the arbitrators are to take into consideration the damage occasioned by severance from other lands of the owner, or otherwise injuriously affecting such other lands. "Injuriously affecting" in that case must be another term for damaging, and does not mean injuriously affecting by way of

(1) Law Rep. 4 Q. B. 358.
(2) 2 B. & S. 605.
(3) Law Rep. 2 H. L. 175.
(4) Ibid. 5 H. L. 418.

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violation of any legal right. He was to be compensated for any damage done to his other land. He says that he is very much damaged as to his other land by the diminution in value of a reservoir, which is left upon his hands, and which will probably supply some water, but which was intended to supply a great deal more. This water he is now prevented from supplying by reason of the acts of the railway company, and that was a damage to be ascertained in some way or another. It was, therefore, a matter fully within the jurisdiction of the arbitrators and umpire to ascertain, in the best way they could, what the amount of reasonable compensation was to be. In ascertaining the amount, the word "profits" was used, upon which the whole thing seems to me to turn. It is said that that must mean profits of trade, and that the umpire could not go into profits of trade. That is a mere play upon words. It is spoken of as profit in the same way as the rents and profits of an estate are spoken of. The umpire had this in his mind; and if the argument founded on the word "profits" has any foundation, it was a clear ground upon which the Court of Queen's Bench ought to have set aside the award. That Court did not do so, and there is not anything before us that was not before that Court. It is said that we have nothing to do with the ultimate decision to which the umpire came, and that we have nothing to do with what passed in his mind, but that the mere fact that he accepted evidence addressed to something called "profits" is quite sufficient to shew that he usurped a jurisdiction which did not belong to him, and that therefore the whole award is void. But if that was so, the rule applied for in the Court of Queen's Bench ought to have been granted. The Judges, however, refused to grant the rule, and said they could see no objection to the award.

I, too, can see no objection to the award. I am bound to say that I do not know any other mode by which the learned umpire could have arrived at a conclusion and satisfied himself properly as to the damage than the mode which he adopted. Mr. *Ripley* says: "If you had left me alone I should have made so much profit; you have interfered, I shall suffer so much loss; pay me the difference." It appears to me quite shocking that a railway company should take a man's property and not pay him for the damage occasioned to him.

I am of opinion that the decree of the Master of the Rolls is perfectly right.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The first question is, whether the umpire was entitled to enter into the question how far Mr. *Ripley* was damaged by reason of his losing the sale of the water from his reservoirs to mills which would thereafter be built upon the property which was taken by the railway company. I think that the umpire was clearly entitled to go into that question. This is not a case like *Ricket* v. *Metropolitan Railway Company* (1) and the various cases in which the Courts have had to consider how far a person, no part of whose land is taken, can recover on account of his land being injuriously affected. In this case a considerable quantity of Mr. *Ripley's* land is actually taken. Then, in assessing the value of that property, the umpire is entitled to consider how much the other property of Mr. *Ripley* has been damaged by reason of this property being taken.

It appears that Mr. *Ripley* had constructed these reservoirs for the express purpose of supplying water to mills. Then by an Act of Parliament he was prevented from selling water except for the supply of mills or buildings erected upon his own land. In that position of things a large portion of his land is taken, and of course it necessarily follows that a large portion of the value of the reservoirs is taken from him. It seems to me quite clear that his property in the reservoirs being prejudiced by reason of his other land being taken by the railway company, that loss is a proper head of compensation.

But it is said that even then the umpire ought not to have admitted evidence as to the prospective profits which would be made by selling the water to the mills to be built. Now, I confess I do not see how it was possible that the umpire could discover what loss Mr. *Ripley* had sustained by reason of his being deprived of the advantage of selling the water from his reservoirs to the mills without going into evidence of what those profits would be. No doubt there are deductions to be made from the gross profits, and when the profits are ascertained it has to be considered that

(1) Law Rep. 2 H. L. 175.

L. JJ. 1875 RIPLEY v. GREAT NORTHERN RAILWAY CO.

the compensation will be given at once, whereas the profits would only be gained at a future time, and would only be gained at a certain risk and certain expense. All those deductions are to be made; but I do not know how the value of such property can possibly be ascertained unless you commence by ascertaining the profits, and then make all proper deductions.

I am of opinion, therefore, that the evidence of profits was properly received, although I also think that if it had been improperly received, that would not be a reason for setting aside the award, unless it had been acted upon; but in my opinion it was properly received for the purpose of arriving at what was the real sum to be awarded, making all proper deductions. There is nothing to shew that the umpire did not make all proper deductions. He gave nothing like the sum which was claimed, and it must be assumed that he reduced it by making proper deductions.

I am of opinion, therefore, that the award is perfectly valid, and that this appeal ought to be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Emmet & Son.*
Solicitors for the Defendants: Messrs. *Field, Roscoe, & Co.*

L. JJ. 1875 *April* 20.

WILCOCKS *v.* CARTER.

[1875 W. 13.]

Injunction—Court of Probate—Grant of Administration—Deed.

By a deed made between the residuary legatee under a will and some of the other next of kin, after reciting that the will had been made, but a draft only of it had been found, and that the other next of kin were desirous of giving full effect to the will, the other next of kin assigned to the residuary legatee the estate of the testator. One of the other next of kin afterwards applied for administration to the estate of the testator as if he had died intestate:—

Held, that the Court of Chancery had jurisdiction to restrain proceedings in the Court of Probate; but that on the construction of the deed there was nothing in it to prevent the other next of kin from obtaining administration.

Order of *Bacon*, V.C., discharged.

JAMES CARTER, a yeoman, died in 1874 possessed of considerable property. At his death no will of his could be found, but the

draft of a will was found purporting to give the principal part of his property to his niece, *Jane Wilcocks* (then *Jane Carter*). After some interviews between *William Carter*, *Edmund Carter*, and *Jane Carter*, who were three of the four next of kin, a deed dated the 25th of March, 1874, was prepared and executed by them.

By this deed, after reciting that *James Carter* duly made his will, dated the 3rd of October, 1870, whereby he devised all his real estate (subject to charges) and bequeathed his personal estate to his niece, *Jane Carter*, and appointed her sole executrix; and reciting the death of *James Carter*, and that *William Carter*, *Thomas Carter*, *Edmund Carter*, and *Jane Carter* were his sole next of kin; and reciting that the will had not then been discovered, but that *William Carter* and *Edmund Carter* were satisfied, from a reference to the draft of the will which had been preserved, and from the declarations of the attesting witnesses thereto, that a will to the recited purport and effect was duly executed on the day it purported to bear date, and had not been revoked or altered; and reciting that *Thomas Carter*, one of the next of kin, was of weak intellect and incapable of entering into any arrangement; and reciting that *William Carter* and *Edmund Carter* were desirous of giving full effect to the said will as far as respected any estate or interest in the real and personal estate to which they would have been entitled in the event of the testator having died intestate; It was witnessed that for effectuating the said purpose, and in consideration of the premises, *William Carter* thereby granted and confirmed unto *Jane Carter*, her heirs and assigns, all the testator's real estates, and all the estate and right of him the said *William Carter*, as heir-at-law, in the hereditaments thereinbefore assured: To hold the same subject and charged as in the said will was mentioned: And for further effectuating the purposes aforesaid, and in consideration of the premises, the said *William Carter* and *Edmund Carter* thereby assigned unto *Jane Carter*, her executors, administrators, and assigns, all and every the parts, shares, and interests of them or to which they would have been entitled if *James Carter* had died intestate of and in his personal estate and effects. The deed also contained a covenant by *William Carter* and *Edmund Carter* for further assurance.

In October, 1874, *Edmund Carter* took proceedings to obtain

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letters of administration to the estate of *James Carter* as if he had died intestate. A caveat was entered on behalf of *Jane Carter* (then *Jane Wilcocks*), and an application on her behalf was made to the Court of Probate, to stay proceedings until an application could be made to the Court of Chancery. The Judge of the Court of Probate refused to stay the proceedings; and the bill in this suit was then filed by *Jane Wilcocks* and her husband against *William Carter* and *Edmund Carter*, stating the deed of 1874 and the proceedings before the Court of Probate, and praying for an injunction to restrain *William Carter* and *Edmund Carter* from proceeding to take out letters of administration to *James Carter*.

In the proceedings before the Court of Probate *William Carter* and *Edmund Carter* had alleged that they had executed the deed without legal advice, and that it was not binding on them.

The Vice-Chancellor *Bacon* granted an injunction; as reported (1). The Defendants appealed.

Mr. *De Gex*, Q.C., and Mr. *Jolliffe*, for the Defendants, said that *Gascoyne* v. *Chandler* (2) and *Sheffield* v. *Duchess of Buckinghamshire* (3) were quite different, as in each of those cases there was an agreement not to dispute the will. Moreover this deed was voluntary, and would not be enforced.

Mr. *Kay*, Q.C., and Mr. *Caldecott*, for the Plaintiffs:—

As long as this deed stands, the Defendants cannot dispute the validity of the will. They have distinctly admitted it, and they have, as far as they can, confirmed it; they cannot now be heard to say that there was no will. The recitals in the deed contain a clear admission of the will, against which the Defendants cannot go. It is possible that even if they obtain administration, they will be obliged to convey to us; but we have a right to take under the will. It is clear that this Court has jurisdiction to restrain proceedings in the Court of Probate. The Defendants suggest that the deed is invalid, but how can that question be determined except in this Court? It will be absurd to put the parties to the enormous expense of litigating the question of will or no will,

(1) Law Rep. 19 Eq. 327. (2) 3 Sw. 418, n.
(3) 1 Atk. 628.

when if there is a will it cannot be acted on. There will be no difficulty, as it is clear that if all the parties interested concur, the Court of Probate will either grant probate or administration, as the parties may wish. It is constantly done in cases of compromise.

SIR W. M. JAMES, L.J. :—

I am of opinion that the order of the Vice-Chancellor has proceeded upon an incorrect view of what the deed is, and of what the consequences of that deed ought to be. The deed consists of two parts; one is the statement of a matter of fact which may or may not amount to an estoppel, or to something in the nature of an estoppel, and may or may not be evidence against the parties who have made that statement under their hands and seals when that deed is pleaded in any Court; but amounts to no contract or bargain of any kind. It is a statement made, no doubt, for the purpose of introducing the second or operative part of the deed, but a statement which gives the Court no right to interfere. The Defendants have, out of their mere bounty, given that statement of an admission. They say, "We believe that there was a will; we believe that it has not been revoked or altered, and, so far as we are concerned, we give you the whole of the parts and shares which we should have been entitled to in the event of an intestacy." That is the whole of what they have done. They have never entered into a bargain to say they would not allege that there was not a will; they merely say, "Assuming that there has been a will, if it has been revoked we still will give you the benefit of that will which once existed." That deed is complete, and there is nothing whatever inequitable in their proceeding to take out administration. It is quite obvious that the question of will or no will must be determined, and the Court of Probate is the place in which it must be determined. There is another person whose interests are involved, and it must be determined whether there should be probate, or administration *cum testamento annexo*, or simple administration.

That being so, it appears to me that we should be doing a great wrong if we were to interfere with the Court of Probate in trying that question, and were to bring the matter into this Court, where we have no power to grant administrations, or to say in what shape administration should be granted. We should be inter-

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fering where we have no means of interfering properly and bringing the matter to a conclusion. There seems to be an estate of some importance, and it is quite necessary there should be a proper legal personal representative constituted.

It appears to me that the case on which the Vice-Chancellor proceeded has no bearing upon the matter. That was a violation of a positive agreement: but here there is no agreement, expressed or implied, against the provisions of which the Defendants are acting.

SIR G. MELLISH, L.J.:—

I am of the same opinion. No doubt this Court has jurisdiction to restrain parties from applying for the grant of an administration or applying for probate, and the Court will so restrain them if it is necessary for the purpose of enforcing a contract which they have entered into, or enabling this Court properly to administer the estate when the Court has got the estate under its control.

But the question here is whether the grant of this administration will interfere with the proper rights of the Plaintiffs. Now, it is quite clear that the grant of administration to the Defendants will not prevent this Court from giving full effect to the operative part of the deed. The operative part of the deed consists of an assignment of the interest which the Defendants had as next of kin and as heir-at-law in the real and personal estate of the testator; and of course the mere fact that they have obtained the grant of an administration would not at all prevent this Court from carrying into full effect this deed. Then it was said, that there is contained, not in the actual operative part of the deed, but in the recitals and the commencement of the operative part of the deed, a covenant, not express but implied, that the Defendants will do nothing to prevent the Plaintiffs from obtaining probate; but in my opinion there is no such covenant to be implied.

[His Lordship then stated the contents of the deed, and observed that the recital as to one of the next of kin being incapable of entering into any arrangement with respect to the estate of the said *James Carter*, seemed to have been inserted for the express purpose of shewing why the parties did not covenant that they would not oppose the will and would allow probate of the will to be granted.]

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The deed was voluntary, and I see no reason why the Court should give to it an effect beyond its plain purport. All that it bound the grantors to was a grant of their interest whether there was a will or not, and the grant of administration will not prevent this Court from giving full effect to it; and as the Court of Probate, no doubt, will give full effect to the evidence contained in these recitals, just as this Court would do, I cannot see any reason for granting the injunction.

The order for an injunction will be discharged, and the motion in the Court below refused with costs.

Solicitors for the Plaintiffs: Mr. *R. T. Jarvis*, agent for Mr. *J. R. Picard, Kirkby Lonsdale.*

Solicitors for the Defendants: Messrs. *Bower & Cotton.*

In re LORD ARDEN'S ESTATES.

L. JJ. 1875 *May* 3.

Practice—Lands Clauses Act—Funds dealt with in different Branches of the Court.

Where two funds paid into Court under the *Lands Clauses Act* have been dealt with by different branches of the Court, and it is desired to deal with both funds at the same time, the Court will give leave to present one Petition in both matters in one branch of the Court, without transferring either of the matters.

IN this case a portion of Lord *Arden's* settled estates were taken by the *Direct Portsmouth Railway Company*, and the purchase-money paid into Court; and in July, 1861, an order was made by Vice-Chancellor *Stuart*, the predecessor of Vice-Chancellor *Hall*, for investment of the purchase-money, and payment of the dividends to the tenant for life.

Another portion of the estates was afterwards taken by the *Petersfield Railway Company*, and the purchase-money paid into Court; and in December, 1864, an order was made by Vice-Chancellor *Wood*, the predecessor of Vice-Chancellor *Bacon*, for investment and for payment of the dividends to the tenant for life.

Both companies had since been amalgamated with the *London and South Western Railway*, and the tenant for life being dead,

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the succeeding tenant for life proposed to obtain an order for payment of the dividends to him. For this purpose it was desired that only one Petition should be presented in both matters.

Mr. *J. Henderson* now applied, on behalf of the tenant for life, to the Lords Justices that the matter in Vice-Chancellor *Bacon's* Court might be transferred to Vice-Chancellor *Hall's* Court, or else that one Petition might be presented in both matters in the Court of Vice-Chancellor *Hall*. The consent of both Vice-Chancellors had been obtained. He referred to *Re Browse's Trusts* (1), where one of the matters was ordered to be transferred.

The LORDS JUSTICES granted permission to present one Petition in both matters in Vice-Chancellor *Hall's* Court.

Solicitors: Messrs. *Cope, Rose, & Pearson.*

L. JJ. 1875 *April* 22.

Ex parte WHITTAKER. *In re* SHACKLETON.

Bankruptcy—Misrepresentation—Rescinding Contract—Purchase by Debtor on Credit pending Bankruptcy Proceedings.

On the 23rd of November *S.* was served with a debtor's summons for a debt slightly exceeding £50, and on the 1st of December committed an act of bankruptcy by non-compliance with it. On the 3rd of December the creditor filed and served a petition for adjudication. On the 5th of December *S.* bought wool at an auction, and called for it on the 12th. The vendor, being unaware of his embarrassed circumstances, allowed him to take it away without his paying for it, and without his making any representation as to payment. On the 14th (Monday) *S.* was adjudged bankrupt, not having taken any steps to oppose the adjudication. He had not sold any of the wool, nor did it appear that he had attempted to raise money on it:—

Held (affirming the decision of the Chief Judge, who had reversed the decision below), that the trustee was entitled to retain the wool as against the vendor, for that the above facts did not furnish sufficient reason for assuming that *S.* did not intend to pay for the wool.

Semble, that if it had been made out that *S.* did not intend to pay for the wool, the vendor would have been entitled to rescind.

THIS was an appeal from a decision of the Chief Judge reversing that of the Judge of the *Halifax* County Court.

(1) 14 W. R. 298.

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On the 23rd of November, 1874, *John Shackleton*, a wool manufacturer at *Halifax*, was served with a debtor's summons by a Mr. *Ragg*, for a debt not much exceeding £50. On the 1st of December, *Shackleton* committed an act of bankruptcy by failing to comply with the requirements of the summons. On the 3rd of December a bankruptcy petition, founded on this act of bankruptcy, was filed by *Ragg*, and was served upon *Shackleton*. The 14th of December was fixed for the hearing of the petition. On the 5th of December *Shackleton* attended a sale by auction of various lots of wool, which was held at the *Mechanics' Hall*, *Halifax*, by Mr. *Frederick Whittaker*, and at this sale *Shackleton* bid for and was declared the purchaser of three sheets and three bales of wool, for £61 10*s.* 6*d.* *Whittaker* was entitled by the conditions of sale to be paid for the goods before delivery, but, as he believed *Shackleton* to be well off, he allowed him to take the goods away on Saturday, the 12th of December, without paying for them. On the 14th of December *Shackleton* was adjudicated a bankrupt in his absence. He had given no notice of his intention to dispute the adjudication. On the 19th of December *Whittaker* for the first time became aware of the bankruptcy proceedings by seeing the adjudication advertised in a *Halifax* newspaper, and on the 21st of December he gave notice to the trustee that he claimed to rescind the contract on the ground of fraud, and demanded to have the wool returned to him. The wool had remained in *Shackleton's* possession, and it did not appear that he had attempted to raise money on it. The trustee having refused to comply with the vendor's demand, application was made to the County Court. The Judge was of opinion that the bankrupt must be taken to have bought the wool without any intention of paying for it, and that his not informing the vendor of the pending bankruptcy petition amounted to fraud. His Honour accordingly ordered the trustee to deliver up the wool to *Whittaker*. The trustee appealed, and the Chief Judge reversed the decision of the County Court Judge (1). *Whittaker* appealed.

(1) 1875. Feb. 15. WN (1875) 32
SIR JAMES BACON, C.J.:—

This is an exceedingly hard case. But still the transaction was one in the ordinary course of commerce. The cases which have been cited, *Cornfoot* v. *Fowke* (6 M. & W. 358), *Load* v. *Green* (15 M. & W. 216), *Noble* v. *Adams* (7 Taunt. 59) contain a principle which

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Mr. *Ambrose*, Q.C., for the Appellant:—

The trustee cannot take these goods unless he adopts the contract.

[The LORD JUSTICE MELLISH:—If an uncertificated bankrupt buys goods, and the vendor delivers them, surely the trustee can lay hold of them.]

I submit not, except subject to the vendor's rights as to rescinding.

[The LORD JUSTICE MELLISH:—Here specific goods were bought—the property passed. Is it not too late to rescind after bankruptcy?]

If a party defrauded elects to rescind the contract, the property

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cannot be disputed. When a fraud is committed, no legal right is acquired by it. All these decisions proceeded upon the ground that a fraud had been committed. The only evidence in the present case is that proceedings in bankruptcy had been commenced against a trader, and that before any adjudication had been made against him, he went in the ordinary course of his business and bought goods at an auction, without telling the vendor that a bankruptcy petition had been presented against him. It is said that the concealment of the petition was a fraud. I can find no authority for that. It is not like the case of the concealment of the loss of a ship from an underwriter, as has been suggested. In each of the cases cited a fraud had been found by a jury. But here, without a particle of evidence, without a shadow of reason, I am asked to convict this man of fraud. How can I guess what sort of defence he might have had to the proceedings in bankruptcy? It is true he was afterwards adjudicated a bankrupt, but he might well have thought that he had a good defence. In both the cases relied on the fraud had been found as a fact by the jury, and in *Load* v. *Green* the decision really went upon a question of order and disposition, which does not arise here. If the vendor chose to part with his goods without getting ready money for them, so much the worse for him. I should be glad if I could decide in his favour, but I cannot do so without violating well-settled principles of law. It is said that the trustee is acting inequitably or dishonestly in quarrelling with the decision of the county court, and that the Court ought to compel its own officer to do that which is just. But the case is quite different from *Ex parte James* (Law Rep. 9 Ch. 609). If I were to decide in favour of the Respondent, I must hold that it is the bounden duty of every man who goes into the market to buy goods, to disclose to the vendor the state of his affairs. Concealment there was none in this case; misrepresentation there was none; ill-luck on the part of the vendor there certainly was. However hard it may be on him, I must hold that these goods which he sold and parted with on credit passed to the trustee in the bankruptcy.

revests: *Cornfoot* v. *Fowke* (1); *Noble* v. *Adams* (2). Here there was manifest fraud; the goods must have been bought without any intention of paying for them. The purchaser got the goods on Saturday, knowing that he must be made bankrupt on Monday, for he had not resisted the adjudication.

[The LORD JUSTICE MELLISH:—That rather tends to shew a fraudulent getting possession of the goods, than a fraudulent purchase. Besides, he made no representation. Will mere silence support your case?]

It is submitted that it will: *Story*, Eq. Jur. (3).

Mr. *Finlay Knight*, for the trustee, was not called upon.

SIR W. M. JAMES, L.J.:—

This is a hard case, but it would be carrying the rule against fraud too far to extend it to this case. A man buying is not bound to tell all his affairs to those with whom he deals, though he must not say anything which amounts to a misrepresentation. I cannot say that *Shackleton* bought these goods without any intention of paying for them. He might suppose that he had a chance of paying *Ragg's* small debt and stopping the bankruptcy proceedings.

SIR G. MELLISH, L.J.:—

I am of the same opinion. We need not go into the question whether mere silence may not in some cases amount to a misrepresentation. It would be outrageous to hold that *Shackleton*, when he purchased, was bound to make any statement to the vendor as to his pecuniary circumstances, so there is nothing to affect the validity of the contract. It is true, indeed, that a party must not make any misrepresentation, express or implied, and as at present advised, I think that *Shackleton* when he went for the goods must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case

(1) 6 M. & W. 358, 378–9. (2) 7 Taunt. 59.
(3) 11th Ed. § 212 a.

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of fraudulent misrepresentation was shewn. But I do not think this sufficiently made out. The debt for which he was proceeded against was a small one, and he did not attempt to raise money on these goods. I cannot say that he may not have thought that he could come to some terms with the petitioning creditor, and stop the bankruptcy proceedings.

Solicitors: Messrs. *Edwards, Layton, & Jaques;* Messrs. *Bower & Cotton.*

L. JJ. 1875 *May* 3.

NEATH CANAL COMPANY *v.* YNISARWED RESOLVEN COLLIERY COMPANY.

[1875 N. 7.]

Injunction—Accommodation Bridge—Private Road—Right of User, how limited—Undertaking not to repeat Trespass.

3 Ch D. 816
5 Ch D 136.

An estate was intersected by a canal under the powers of its Act, and an accommodation bridge was built by the company, over which a private road, leading across the property to a high road, was carried. Coal pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal-owners subsequently carried the tramway across the bridge (excavating the soil of the roadway on the bridge and approaches), in order to carry their coals to a line of railway on the other side of the property.

An action for trespass having been commenced, and a writ of injunction applied for by the canal company, the coal-owners submitted in the action to judgment for £1 damages and costs, and gave an undertaking not to repeat the trespass complained of. The coal-owners having, a few months afterwards, again laid down the tramway, but without breaking the soil on the bridge, it was held by *Bacon*, V.C., that, independently of the undertaking in the action, by which the right of the canal company had been recognised and established, the Defendants' right of access to and passage over the accommodation bridge did not justify the making by them of a tramway upon the bridge and the approaches thereto, and injunction granted accordingly:—

Held, by the Lords Justices, on appeal, that the undertaking given by the Defendants formed a good ground for the interference of the Court (affirming the decision of *Bacon*, V.C.), without going into the question of the right of the Defendants to make the tramway.

THE bill in this case was filed to restrain the Defendants, the *Ynisarwed Resolven Colliery Company*, from laying down and using

a tramway upon an accommodation bridge over the *Neath Canal*, by which the lands of the Defendants were intersected.

The company of proprietors of the *Neath Canal Navigation* were incorporated by an Act passed in 1791 (31 Geo. 3, c. 85), with powers to purchase lands for making the canal and the works thereby authorized, and also to erect and maintain such bridges and other works as the company should think requisite and convenient for the purposes of such navigation, and for the carrying and conveying goods and other things to and from the canal.

By sect. 5 it was enacted that "In all cases where in the exercise of any of the powers aforesaid any part of any carriage road, either public or private, shall be found necessary to be cut through, taken, or so much injured as to be impassable or inconvenient for travellers or carriers, or the persons entitled to the use thereof, the company of proprietors shall, at their own expense, before such road be cut through, taken, or injured as aforesaid, cause a good and sufficient carriage road to be set out and made instead thereof, as convenient for passengers and carriers as the road so cut through, taken, or injured as aforesaid, or as near thereto as may be, and shall cause the same to be put into good and substantial repair and condition."

Sect. 50 provided that all persons should have free liberty to use with horses, cattle, and carriages the private roads and ways belonging to the company (except the towing paths) for conveying goods and other things to and from the canal, and any wharfs, quays, or landing-places belonging thereto, without paying for the same, with power to navigate upon the canal, and to use the wharfs, quays, or landing-places for loading and unloading goods, and the towing-paths for the hauling and drawing boats and barges upon payment of the rates thereinbefore granted.

Sect. 51 contained provisions for fencing the towing-paths, making and maintaining gates and stiles, and also for erecting bridges, arches, culverts, &c., of such dimensions and in such manner as certain commissioners appointed by the company should from time to time judge necessary and appoint, with a provision that the company should not make the canal or any feeder, &c., in or across any common, highway, public bridleway or footpath, until they should, at their own expense, have made and perfected

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NEATH CANAL COMPANY v. YNISARWED RESOLVEN COLLIERY CO.

such bridges, passages, or arches across such highway, bridleway, or footpath, and of such dimensions and in such manner as the commissioners should judge proper, and all such gates, stiles, bridges, arches, and other conveniences should from time to time be supported and kept in repair by the company: in case of refusal or neglect on the part of the company to erect or to repair, &c., when erected, the above-mentioned works, it should be lawful for the owners or occupiers of lands who felt themselves aggrieved by any such neglect or refusal, to make, erect, and set up such gates, stiles, bridges, passages, &c., and other conveniences as the commissioners should have before directed or appointed to be made, &c., and to maintain, repair, and support the same.

Sect. 52 provided that if the owners or occupiers of any lands, &c., through which the canal should be made, did, or should at any time thereafter find that any of the gates, stiles, bridges, passages, arches, culverts, tunnels, drains, or other passages over, under, or by the side of the canal, towing-paths, aqueduct, or feeders belonging thereto, or any such watering-places and other conveniences which the commissioners should have directed or appointed to be made by the canal company, were insufficient either in the number or situation for the commodious use and occupation of their respective lands, grounds, mills, and hereditaments, it should be lawful for any of such owners or occupiers, with the consent and approbation of the company, upon request made to them for that purpose, or, in case of their refusal for twenty-one days after such request, then, with the consent and approbation of the commissioners, to make, fix, and erect at their own costs and charges such gates, stiles, bridges, &c., of the same or the like construction with those made and erected by the said canal company, in such places as should be found and judged most necessary and convenient for the better use and occupation of such lands, and to repair and support the same at their own like costs and charges as occasion should require, so as the navigation of the said canal be not prevented or obstructed thereby for any longer space of time or in any other manner than the doing of such works would necessarily require.

The lands required for the construction of the canal, including a portion of the *Ynisarwed* farm, across which a private road led

from the farmhouse to the turnpike road from *Neath* to *Glynneath*, were purchased in 1794 under the powers of the Act, and the canal was constructed. The canal company built a bridge to carry this private road across their canal, and, as the bill alleged, the bridge had ever since been used by the persons entitled to use the private road as a means of access from the farm to the turnpike road. Coal pits had been opened upon the *Ynisarwed* property for the last fifty years, and the coals and minerals until recently were shipped at a wharf on the bank of the canal (to which a tramway ran from the pits without crossing the bridge), and sent off by the canal.

In 1871 the owner of the coal pits commenced laying a tramway across the bridge, as a connecting link between the tramway leading to the canal and a tramway on the other side of the bridge leading to the railway, for the purpose of taking the coals from the pits to the *Vale of Neath Railway*, which ran outside the *Ynisarwed* property, on the other side of the canal, from and beyond the *Neath* turnpike road. The Plaintiffs threatened legal proceedings, and the proposed works were stopped. In 1873 the Defendants, who were a steam colliery company, obtained a lease of the property, and recommenced making a tramroad upon the bridge and approaches thereto, part of the fabric of the bridge being excavated and holes dug in the soil of the approaches. The Plaintiffs removed the rails and tram-plates, which were again laid down by the Defendants; and on the 1st of December, 1873, the Plaintiffs commenced an action in the Common Pleas against the Defendant company for the alleged trespass, claiming £1000 damages, and a writ of injunction to restrain the Defendants from the repetition or continuance of the trespasses complained of.

The Defendants pleaded to the action their right to carry minerals over the bridge for the better and more commodious use of their lands, through which the canal was constructed, and for that purpose to construct and maintain a tramway upon, over, and across it.

Issue was joined in the action, but on the 20th of May, 1874, the Defendants issued a summons for leave to withdraw their pleas; and on the 30th of May, 1874, an order was made that the Defen-

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dants should withdraw their pleas, "and on payment of £1 damages and costs, to be taxed, all further proceedings to be stayed, the Defendants undertaking not to repeat the trespasses, and also forthwith to put the Plaintiffs' bridge and that portion of the land in the declaration mentioned adjoining the bridge in the declaration mentioned in the state they were in previous to the trespasses complained of."

An undertaking on the part of the Defendants not to repeat the trespass complained of was also signed by their attorneys.

In January, 1875, the Defendants again laid down a tramway across the bridge, and used it for carrying coals and minerals to the *Vale of Neath Railway*. On this occasion they did not disturb the fabric of the bridge, or make any holes in the soil, but laid fresh material on the surface, and laid the rails in this fresh material. On being remonstrated with, they stated that they were "simply exercising their right of user of the bridge over the canal without detriment to it or the property of the canal company."

Under these circumstances the canal company, on the 23rd of February, 1875, filed this bill to restrain the Defendants from laying down, or permitting to continue laid on the bridge or the approaches thereto, or any part of the Plaintiffs' land, any tramroad or railroad, and from excavating or interfering with the fabric of the bridge, digging holes, or otherwise injuring or interfering with the soil of the Plaintiffs' land, and from using the bridge, or the approaches thereto, or any part of the Plaintiffs' land for the purpose of a tramroad.

The Plaintiffs moved for an interim injunction in terms of the prayer. On the argument they contended that, independently of the undertaking given by the Defendants in the action, the use of the accommodation bridge by the Defendants was limited to the ordinary right of passage across it, and that they were not entitled to excavate or in any way to injure or interfere with the soil or the fabric of the bridge.

The Defendants, on the other hand, contended that their right to use the bridge was unlimited; that the use of accommodation works constructed by a company under their Act could not be restricted to the purposes for which the land was used at the time

when they were constructed; but must be extended from time to time to suit the altered condition of the property (1).

The Vice-Chancellor granted the injunction, without requiring any undertaking from the Plaintiffs to abide by any order as to damages. From this decision the Defendants appealed (2).

(1) The following cases as to the extent of the right of the Defendants were cited in the argument before the Vice-Chancellor:—*Thorpe* v. *Brumfitt* (Law Rep. 8 Ch. 650); *Goodson* v. *Richardson* (Law Rep. 9 Ch. 221); *United Land Company* v. *Great Eastern Railway Company* (Law Rep. 17 Eq. 158).

(2) 1875. Mar. 23.

SIR JAMES BACON, V.C.:—

The Plaintiffs are clearly owners of the bridge and the approaches thereto, and the terms of their purchase deed, by which the soil now occupied by the canal and the approaches to the bridge were conveyed to them in 1794, would be sufficient to enable them to maintain an action of ejectment. This right in the Plaintiffs to the possession of the bridge is modified only by the right reserved by the *Canal Act* to the vendors, who parted with their land for the purposes of the undertaking, of having passage over and right of access to the bridge. This right of access and of user has never been questioned by the Plaintiffs. I agree with the decision in *United Land Company* v. *Great Eastern Railway Company* (Law Rep. 17 Eq. 158), but it does not apply to the present case. The Plaintiffs at a considerable cost have made the canal and towing-path, and opened a communication from one part of the Defendants' land to the other. There is no suggestion that the user of the landowner which was given to him by the *Canal Act* has been fettered. What the Defendants have done has been to build a structure upon the Plaintiffs' bridge. A house would be just the same. They have unlawfully interfered with the Plaintiffs' soil, carried earth on to this bridge, which is the Plaintiffs' property, and made a bank in which the sleepers for the tramway are laid. The Plaintiffs, who are owners in fee simple of the land, find that it is being invaded by the conduct pursued by the Defendants, who have trespassed upon that which is not their property for the purpose of making this tramway. If the case rested on that only, I should think that the Plaintiffs were entitled to say that the Defendants, although entitled to use the bridge in any legitimate way, could not lay down a tramway upon it.

But then, in addition, we have the proceedings in the action at law, which were hardly touched upon in the elaborate argument for the defence. The Courts of Common Law have just as plain and good a right to grant an injunction as this Court has. The action was put an end to by the Defendants submitting to the injunction prayed against them, and undertaking not to repeat the trespass complained of. The right of the Plaintiffs was thus recognised and established, not by any adjudication at law, but by the plain confession of the Defendants that they had been in the wrong. It is said that they compromised the action because they contemplated obtaining the erection of a new bridge. Nothing, however, was then said about it, and if the Defendants have the right to compel the erection of a new bridge, so

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Mr. *Swanston*, Q.C., and Mr. *Crossley*, for the Appellants:—

The object of the suit is to compel us to send our coals by the Plaintiffs' canal instead of by the *Vale of Neath Railway*. As owners of the land on either side of the canal, we are not to be obstructed in our communication from one portion of our estate to the other. The object of the Act was that we should have the same right of access as before the land was taken: *Senhouse* v. *Christian* (1).

[The LORD JUSTICE JAMES:—How can we go into the rights of the parties as they existed before the action? The Defendants have admitted the right of the Plaintiffs by their undertaking.]

The trespass tried in the action was not the same as that which is now complained of. The ground of the action was that we had broken holes in the bridge, and the undertaking only extended to the repetition of that offence. We have not repeated that offence; we are now simply trying our right to run railway carriages over

much the more unreasonable is their present conduct. The result of the proceedings at law is a confession of wrong on the part of the Defendants, a submission to an injunction, and an undertaking not to repeat the wrongful act. They have never been impeded in the user of the bridge which the Act of Parliament gave them; but there is no right given by that Act, and, in the face of their undertaking, it is wrong for them to build an iron structure upon the Plaintiffs' bridge, or to ask for more than the right to use the bridge. I am not impressed with the difficulty which, it is suggested, will be occasioned to the Defendants by granting the interim injunction. They may bring their coals in any way they like down to the canal, and get them conveyed across to the other side. The Plaintiffs, therefore, are entitled to an injunction to restrain the Defendants, &c., until the hearing or further order, from laying, or placing, or affixing, or from permitting to continue, or remain laid, &c., on or to the said bridge, or the approaches thereto, or any part of the land of the Plaintiffs, rails, tram-plates, sleepers, or other articles, or any earth, stones, or rubbish, and from making or constructing, or permitting to continue, or remain, any tramroad or railroad over, upon, or across the said bridge, or the approaches thereto, or upon any part of the Plaintiffs' land, for the purpose of a tramroad across the said bridge, and from excavating or in any manner interfering with any part of the fabric of the said bridge, and from digging any holes in or otherwise injuring or interfering with the soil of the Plaintiffs, and from using the bridge, or the approaches thereto, or any part of the land of the Plaintiffs for the purpose of a tramway, or for the passage along such tramway of waggons, or vehicles of any kind, either for the carriage of coal, minerals, or other articles, or otherwise.

(1) 1 T. R. 560.

the bridge. If our present act is a breach of the undertaking, the Plaintiffs ought to proceed against us for contempt of Court. At all events it is not a case for an injunction, still less for a mandatory injunction. No irreparable injury has been inflicted upon the Plaintiffs, and it is a hard case upon the Defendants. The Plaintiffs are, therefore, at best only entitled to damages: *Durell* v. *Pritchard* (1); *Hepburn* v. *Lordan* (2); *Bowes* v. *Law* (3); *Deere* v. *Guest* (4); *Goodson* v. *Richardson* (5). At all events the Plaintiffs ought to give the usual undertaking as to damages, which has not been inserted in the order.

Mr. *Kay*, Q.C., and Mr. *Everitt*, for the Plaintiffs were not called on.

SIR W. M. JAMES, L.J.:—

Subject to the Plaintiffs giving the usual undertaking as to damages, I am of opinion that the Vice-Chancellor was quite right in granting the injunction. The very same question as is now at issue was raised in the action at law, namely, whether the Defendants have a right to alter the bridge so as to adapt it to running railway carriages. The Defendants put in a plea asserting their right to do so. They escaped the consequences of this action—they escaped the payment of damages—by submitting to a verdict against them, and giving an undertaking not to alter the bridge—not to do, in fact, the very thing that they are now doing. If they were entrapped into giving this undertaking, or had any other good reason for getting rid of it, they might have taken some step to set it aside. They have not done so; therefore the injunction is a matter of course. The order of the Vice-Chancellor is quite right, except that the Plaintiffs must give the usual undertaking as to damages. The Appellants must pay the costs of the appeal.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Hunt & Son;* Mr. *I. H. Wrentmore*, agent for Mr. *Alfred Curtis, Neath.*

(1) Law Rep. 1 Ch. 244.
(2) 2 H. & M. 345.
(3) Law Rep. 9 Eq. 636.
(4) 1 My. & Cr. 516.
(5) Law Rep. 9 Ch. 221.

L. JJ.
1875
April 22.

Ex parte HARRIS. *In re* HARRIS.

Bankruptcy—Disputed Debt—Excessive Claim—Costs.

C. issued a debtor's summons against *H.* for £517, alleged to be due on a balance of account. An application to dismiss the summons was refused, and payment not having been made *C.* petitioned for adjudication. The Registrar went into the account, and being of opinion that more than £200 was shewn to be due, adjudicated *H.* bankrupt. On appeal, the Lords Justices, being of opinion that not more than £110 was proved to be due, though *C.* might possibly be able to establish a right to something more, directed that on *H.* paying £110 within fourteen days all proceedings under the adjudication should be stayed without prejudice to any independent proceedings by *C.* for any further sum, and made no order as to costs.

In this case, reported *ante*, p. 264, Mr. Registrar *Pepys*, upon the matter coming before him again, in pursuance of the order of the Lords Justices, went into the account between *Harris* and *Cockle*, the petitioning creditor. The balance appearing due on the account, as made out by *Cockle*, was £517 0*s.* 3*d.*, for which amount the debtor's summons had been issued. The Registrar considered that there must be struck off from this balance £270 15*s.* 6*d.*, leaving upwards of £200 due. He accordingly found that there was due a sum of more than £50, and adjudicated *Harris* bankrupt. *Harris* appealed.

Mr. *Harris*, in person, in support of the appeal, contended that various sums charged against him, which the Registrar had allowed, ought to be disallowed.

Mr. *R. T. Reid*, for the petitioning creditor.

Sir W. M. James, L.J.:—

Upon the investigation of this account, Mr. *Cockle*, in our opinion, has not proved that more than £110 was due to him, though he may ultimately establish a right to something more. As we find more than £50 to be due, the adjudication will stand, but subject to this, that if Mr. *Harris* within fourteen days pays the £110, all further proceedings will be stayed without prejudice

to any independent proceedings by Mr. *Cockle* in respect of anything claimed to be due to him above the £110. As the proceedings have been founded on a claim for an amount greatly exceeding what was due, we make no order as to costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Creditor: Messrs. *Nash, Field, & Mathews.*

BUSH *v.* TROWBRIDGE WATERWORKS COMPANY.

[1874 B. 291.]

Compensation—Injuriously affected—10 & 11 *Vict. c.* 17, *s.* 6—8 *Vict. c.* 18, *s.* 68 —*Answer—Demurrer—Costs.*

The abstraction by a waterworks company of water from a stream does not entitle a riparian proprietor below to require the company to treat under the 6th section of the *Waterworks Clauses Act*, 1847, for the purchase of his interest in the stream, but entitles him only to compensation as for land injuriously affected.

Where a bill is dismissed at the hearing, the Defendant will not, on the ground that he might have raised the same defence by demurrer, be deprived of his costs.

Decree of the Master of the Rolls affirmed.

BY the *Trowbridge Waterworks Act*, 1873, with which was incorporated the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), and the *Lands Clauses Consolidation Act*, 1845 (8 Vict. c. 18), the *Trowbridge Waterworks Company*, the Defendants in this suit, were incorporated and were empowered to make and maintain certain waterworks, and to divert the water of the *Biss* springs, which formed the principal supply of the *Biss Brook*.

E. M. Bush, the Plaintiff in this suit, was tenant for life of certain water meadows through which the *Biss Brook* flowed, and which were irrigated by water from the *Biss Brook*.

The Defendants completed their waterworks, and took water from the *Biss Brook* at a place about two miles above the meadows belonging to the Plaintiff.

The Plaintiff thereupon filed her bill, alleging that the flow of

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water was materially diminished by the act of the Defendants, and praying that the Defendants might be restrained from taking the water until they should have given to her notice of their intention to take such water, and should have offered to treat for the purchase of the interest of the Plaintiff and the remainderman therein, and until the compensation for such interest should have been settled.

The cause came on to be heard on motion for decree before the Master of the Rolls, who dismissed the bill with costs on the ground that the Defendants could not be compelled to proceed under the 18th clause of the *Lands Clauses Act* to give notice, and that the Plaintiff could, under the 68th clause, obtain compensation as for land injuriously affected; as reported (1). His Honour expressed his opinion that though the Defendants might have raised the question on demurrer, that ought to make no difference as to the costs.

The Plaintiff appealed.

Mr. *Chitty*, Q.C., and Mr. *G. C. Price*, for the Plaintiff:—

The Defendants have taken part of the water which flowed over the Plaintiff's land, and which she used. Her right to the water is not only an easement, but also a proprietary right, and they have diverted the water, and so deprived her of part of the accustomed flow. She is clearly an owner and an occupier of the stream taken by the Defendants within the meaning of the 6th clause of the *Waterworks Act* (10 & 11 Vict. c. 17), and as such she is entitled under that clause to compensation as for land taken, and she must be so treated by the Defendants. The Defendants are clearly taking part of the stream. Sect. 14 shews that the word "take" applies to water, and not merely to land. Sect 68 of 8 Vict. c. 18, does not apply to a case like this: *Ferrand* v. *Corporation of Bradford* (2).

The 6th section of the *Waterworks Act* uses the word "owner," and the word must therefore be used in a non-natural sense: *Hammersmith and City Railway Company* v. *Brand* (3), as there can be no owner of running water: *Wright* v. *Howard* (4); *Gale*

(1) Law Rep. 19 Eq. 291.
(2) 21 Beav. 412.
(3) Law Rep. 4 H. L. 171.
(4) 1 S. & S. 190, 203.

on Easements (1). The only meaning which can be given to the word in this Act is riparian proprietor, and the Plaintiff therefore comes in under that clause. Even under sect. 15 of the *Waterworks Act* the Plaintiff is entitled to notice. No doubt there will be a difficulty in fixing the amount of compensation to be claimed, but that ought to be thrown on the company, not on the landowner. The Act is obscure, and we ought to have the benefit of any doubt as to how we are to obtain compensation. This Court has always kept public bodies within the limits of their powers.

At all events the Plaintiff ought not to have been ordered to pay the costs of bringing this suit on to a hearing, as there is no question on the facts, and the only question might have been raised by demurrer.

[The LORD JUSTICE JAMES:—I know of no rule that a Defendant is obliged to demur, and run the risk that something may be picked out of the bill which will be enough to maintain it. If the Plaintiff files his bill and fails, he must pay the costs.]

Such a rule has been acted upon in many cases, and by many Judges: *Hill* v. *Reardon* (2); *Jones* v. *Davids* (3); *Godfrey* v. *Tucker* (4); *Webb* v. *England* (5); *Ernest* v. *Weiss* (6); *Nesbitt* v. *Berridge* (7).

Mr. *Roxburgh*, Q.C., and Mr. *Whitaker*, for the Defendants, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls was quite right. I have never been able to see any reasonable ground for the suggestion of the Plaintiff in this case, that the waterworks company were in any way taking or using anything of which she was the owner or occupier. If she is not the owner or occupier of something which they are taking or using, she is not entitled to have compensation assessed before they take or use it. I am of opinion that it is impossible, in any legal or other sense of

(1) 4th Ed. p. 209
(2) 2 S. & S. 431, 439.
(3) 4 Russ. 277.
(4) 33 Beav. 280.
(5) 29 Ibid. 44.
(6) 9 Jur. (N.S.) 145.
(7) 11 W. R. 446.

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the words, to say that she was the owner or occupier of anything which they entered upon or took. They entered upon the channel or bed of a stream somewhere above the Plaintiff's land, and there they took, by way of diversion, water for the purpose of their waterworks, which water, to put the case in the highest for the Plaintiff, would in due course, if they had not so diverted it, have got down to her land, and would then, and so long as it was over her land, be water of which she was the owner and occupier in the sense in which a person is owner or occupier of a stream running through his land. That is to say, the water then would have become within the ownership and, to some extent, within the occupancy of the Plaintiff. But when it was intercepted by the Defendants, just as if it was intercepted by any other riparian proprietor, although it might have become part of her property, the water which was actually intercepted was not her property.

What was done did, no doubt, injuriously affect her land by diverting water which otherwise would have reached her. That is a thing which is provided for by an entirely different section of the Act of Parliament, and not by anything which the Plaintiff has been relying upon, that is to say, by the 12th section of the *Waterworks Act*, which says in terms that the waterworks company may from time to time divert and impound the water from the streams, but shall make full compensation to all persons interested for all damage sustained by them through the exercise of such powers. This clause exactly describes what they have done. They having made the waterworks, have diverted and impounded the water from its course, so that it does not flow to the land of the Plaintiff, but flows to the town which they are supplying with water, and having done so, they are obliged to make full compensation to her. She never was deprived of her right to compensation; she had and has a right to full compensation for all damage done to her by means of the diversion of the water; and what she has tried to do by this bill is to endeavour in some way or other to bring the company into a difficulty, by which she could apparently make the company not give compensation to her for the damage she has sustained, but purchase from her some right or other which she fancied she could compel them to purchase.

One can conceive it possible that a stream may be actually

taken from the occupation of an owner or occupier, as in the case of a millstream, the whole of which might be absorbed by the waterworks company until the stream was destroyed as a millstream, and in that sense of the word it might be taken and used. I do not know whether such a case is provided for by the Act, and to my mind it is not necessary to go into that question, because I am clearly of opinion that the Plaintiff has failed in shewing that she was the owner or occupier of anything taken or used by the company, or that she was anything more than a riparian proprietor injuriously affected, that is to say, damaged by the operations of the company. She has then the same right against them that anybody would have against a trespasser for diverting water above. That being so, I am of opinion that the Master of the Rolls was quite right in the decision he came to in this case.

With regard to the other point, as to costs, I am of opinion that this was an experiment on the part of the Plaintiff, endeavouring to get something more than she was entitled to. Having a clear right to get the fullest possible compensation, she tried to raise this point; she has failed in it, and I can see no ground whatever for differing from the Master of the Rolls in saying that she ought to pay the costs of her unsuccessful attempt to get more than this Act of Parliament has given her. A great many cases have been referred to where the Court was of opinion that there was some technical objection, or that there was some other point which might have been raised, and ought to have been raised, if the parties had acted reasonably, by way of simple demurrer, which would have rendered the continuance of the suit unnecessary, and that the Court may take that into consideration in dealing with the costs of the suit. But the Master of the Rolls did in this case exercise his judicial discretion, and it is not the practice of this Court to interfere with the exercise of a judicial discretion, especially in a case like this, in which it has always been the custom to convert all these matters, which would otherwise come on upon interlocutory motions, as rapidly as possible into the stage of final hearing, so as to have the whole thing brought to a conclusion as quickly as possible, and so as to have only one appeal instead of two.

I am of opinion that the practice of the Master of the Rolls is

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entirely right in that respect, and I should be sorry if we were to make any difference with regard to the costs of the proceedings.

The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Plaintiff: Messrs. *Warry, Robins, & Burges.*
Solicitors for the Defendants: Messrs. *Whitakers & Woolbert.*

L. JJ. 1875 *May* 31.

LATCH *v.* LATCH.

[1875 L. 26.]

Practice—Administration Suit—Parties—One Executor not a Party to the Suit—15 & 16 *Vict. c.* 86, *s.* 42, *rr.* 1, 6.

A testator appointed three executors, and made his executors and two other persons his residuary legatees. All the executors proved, and one of them filed a bill for the administration of the estate, and for a partition, to which another of the executors was made sole Defendant. The remaining executor and also the other two residuary legatees were served with a copy of the decree:—

Held, that the bill could not be sustained without making the remaining executor a party Defendant.

THIS was an appeal from a decree of Vice-Chancellor *Hall.*

Joseph Latch made his will, dated the 17th of February, 1871, and thereby gave his residuary real and personal estate unto and between his three sons, *Thomas Latch, John Latch,* and *Henry Latch,* and his daughter *Maria Cairns,* and his grand-daughter *Winifred Collins,* in equal shares, and appointed his said three sons his executors.

The testator died in November, 1873, and his will was proved by all his three executors. *Maria Cairns* died in January, 1875, having by her will appointed *W. Talbot* and two other persons her executors.

Henry Latch, one of the executors and residuary legatees of *Joseph Latch,* filed a bill for the administration of the real and personal estate of the testator, and for a partition, to which he

made *Thomas Latch*, another of the executors and residuary legatees, the sole Defendant.

On the 13th of February, 1875, a decree was made for the administration of the real and personal estate; and, among other inquiries, an inquiry was directed who were the parties entitled to the testator's residuary real and personal estate, and in what shares and proportions.

The other executor, *John Latch*, and also *Winifred Collins* and the executors of *Maria Cairns*, were served with a copy of the decree.

John Latch refused to come in and account in the suit, alleging that the decree was irregular, and not binding on him; and *Winifred Collins* and the executors of *Maria Cairns*, with the leave of the Court, presented a petition of appeal against the decree.

Mr. *Freeling* (Mr. *Dickinson*, Q.C., with him), for the Appellants:—

The bill is filed under a misapprehension of the meaning of the 1st and 6th rules of the 42nd section of the *Chancery Improvement Act* (1). It was never intended that an estate should be administered in the absence of any of the executors or trustees who are assenting parties. There is no precedent for such a bill, and if it could be sustained, two executors or trustees might collude together to administer the estate in the absence of their co-executor or co-trustee, and conceal their own misconduct. This is a suit for the general administration of the estate, and not a suit against a defaulting executor under Consolidated Order VII. r. 2. If an executor who is not made a party does not consent to appear when served with the decree, the Court has no means of compelling him to account, and the administration of the estate will be imperfect.

(1) 15 & 16 Vict. c. 86, s. 42, r. 1: "Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person."

Rule 6: "Any executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate or the execution of the trusts."

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Mr. *Romer* (Mr. *W. Pearson*, Q.C., with him), for the Plaintiff:—

The frame of the suit may be unusual, but it is not for that reason irregular. It is within the words of the 6th rule of the 42nd section of the *Chancery Improvement Act*. The word "any" in rules 1 and 2 means any one of several; and it must have the same meaning in the 6th rule. The executor who is not made a party has been served with the decree, and he is bound by it in the same manner as if he were originally made a party to the suit. In the present case the Plaintiff is not only an executor but a residuary legatee, and he is entitled to a decree under the 3rd rule of the same section even if he is not entitled under the 6th. The object of the Act was to give great facilities to persons interested in an estate to obtain a decree for administration, and when the estate is once in the Vice-Chancellor's Chambers the Court will take care that it is properly administered.

Mr. *W. Barber*, for the Defendant.

Mr. *Freeling*, in reply.

SIR W. M. JAMES, L.J.:—

I cannot see my way to making a decree for an account against an accounting party in his absence. The decree must be reversed, and the Plaintiff may have liberty to amend his bill by making *John Latch* a Defendant. The costs of the appeal will be costs in the cause.

SIR G. MELLISH, L.J., concurred.

Solicitor for the Appellants: Mr. *J. T. Marshall.*

Solicitors for the Respondents: Messrs. *T. White & Sons*, agents for Mr. *T. M. Llewellin, Newport, Monmouthshire.*

WILLIAMS *v.* GUEST.

L. JJ.
1875
June 11.

[1872 W. 9.]

Practice—Appeal from Order directing Issues—Discretion of Court.

An appeal will lie from an order of a Judge of the Court of Chancery directing an issue before a jury; but if the Court of Appeal is of opinion that there is really a conflict of evidence, it will not interfere with the discretion of the Judge in directing an issue.

THE bill in this case was filed by *Susan Williams* and others against the *Dowlais Iron Company* and the Marquis of *Bute* and his trustees, lords of the manor of *Sengith Supra* in the county of *Glamorgan*, under whom the company held a mining lease, for the purpose of restraining the Defendant company from working their mine under a piece of land containing ten acres in the parish of *Gelligare* which the Plaintiffs claimed as their property. The Defendants, on the other hand, alleged that the piece of land in question was part of the waste of the manor. The parties went into evidence as to their title; and at the hearing before the Master of the Rolls numerous English and Welch witnesses were produced on both sides for examination in Court respecting the identity and boundaries of the land in question.

When the Plaintiffs' witnesses had been examined the Master of the Rolls said that the questions at issue were of such a nature that it was impossible for him to come to a satisfactory decision without the assistance of a jury, who might have the opportunity, if it was thought desirable, of viewing the locality. He therefore made a decree directing certain issues to be tried before a jury at the next assizes at *Gloucester*, and reserving all questions till after the issues had been tried. The Defendants appealed from this decree.

Mr. *Giffard*, Q.C., and Mr. *Everitt*, for the Defendants, the *Dowlais Iron Company*.

Mr. *Southgate*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiffs, took the preliminary objection that there could be no appeal from

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an order directing an issue before a jury. It was a matter entirely in the discretion of the Judge for the purpose of informing his own mind. They referred to *Maddock's* Chancery Practice (1); *Daniell's* Chancery Practice (2); *Hampson* v. *Hampson* (3); *Roskell* v. *Whitworth* (4); *Shrubsole* v. *Schneider* (5); *Ohlsen v. Terrero* (6).

The only case in which an order directing an issue had been reversed by a Court of Appeal was *Nicol* v. *Vaughan* (7), where the House of Lords thought there was no question at all to be tried.

SIR W. M. JAMES, L.J.:—

We cannot treat this objection as a preliminary objection to the jurisdiction of the Court. The Defendants may be able to shew that the Plaintiffs had no evidence to go to a jury. They may shew that it was not a case for the exercise of any discretion at all on the part of the Judge; but that the bill ought to have been dismissed at once. That would be good ground for an appeal.

SIR G. MELLISH, L.J.:—

I think that it is not correct to say that an appeal does not lie from such an order as this. The Defendants are entitled to raise the point that no case for the exercise of the discretion of the Judge has been really raised. It was so in *Nicol* v. *Vaughan*, the case cited before the House of Lords. If it appears that there is evidence which may be left to a jury, and the Judge says that he finds a difficulty and needs the assistance of a jury, this Court will not interfere.

The arguments on the appeal were then proceeded with.

Mr. *Giffard*, Q.C., and Mr. *Everitt*, for the Defendants, the *Dowlais Company*.

Mr. *Kekewich*, for the lords of the manor.

(1) 3rd Ed. vol. ii. p. 621.
(2) 4th Ed. p. 972.
(3) 3 V. & B. 41.
(4) Law Rep. 5 Ch. 459.
(5) 12 W. R. 359.
(6) *Ante*, p. 127.
(7) 5 Bl. (N.S.) 505.

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Mr. *Southgate*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiffs, were not called on.

The LORDS JUSTICES were of opinion that there was evidence on behalf of the Plaintiffs to go to a jury, and therefore that they could not interfere with the discretion of the Master of the Rolls. The appeal was dismissed with costs.

Solicitor for the Appellants: Mr. *F. S. Gosling*, agent for Messrs. *Luard & Sherley, Cardiff*.

Solicitor for the Defendants: Mr. *C. T. Foster*.

PRYOR *v.* PRYOR.

L. JJ.
1875
June 23.

[1864 P. 78.]

Partition Act (31 & 32 *Vict. c.* 40), *ss.* 3, 4—*Decree—Compulsory Sale.*

In 1864 a decree was made for a partition, liberty being given to carry in proposals for a sale before the commission should be issued. No commission was issued, and after the *Partition Act* of 1868 had come into operation a supplemental bill was filed praying for a sale or a partition:—

Held, that the rights of the parties under the decree were not taken away by the *Partition Act*, and that the Court had not now power to compel a sale.

Decree of *Bacon*, V.C., affirmed.

IN this suit a decree was, in 1864, made for a partition, with liberty to the parties to carry in proposals for a sale. No commission was issued, but in 1873 a supplemental bill was filed praying for a partition or a sale, and at the hearing a sale was asked for. Some of the parties objected to a sale, and the Vice-Chancellor *Bacon* held that, a decree for partition having been made before the *Partition Act* (31 & 32 Vict. c. 40) was passed, the Court could not now, under that Act, order a sale; as reported (1).

The parties who wished for a sale appealed.

Mr. *Eddis*, Q.C., and Mr. *Macnaghten*, for the Appellants.

Mr. *Kay*, Q.C., and Mr. *Whitehorne*, Mr. *Jackson*, Q.C., and

(1) Law Rep. 19 Eq. 595.

L. JJ. 1875 PRYOR v. PRYOR.

Mr. *E. James*, for parties who objected to the sale, were not called upon.

SIR W. M. JAMES, L.J.:—

I do not think we can alter the decree; and we are, in truth, asked to alter the decree. In a partition suit no doubt the Court has now power to make a decree for a sale, but in this case, as the Vice-Chancellor has pointed out, there is a decree in existence, which decree might have been inrolled. Supposing that decree had been inrolled, then, if it should be found that all parties were present, the commission was to issue. There was, no doubt, added to that decree liberty to the parties to bring in proposals for a sale, but that clause must be understood with reference to the then state of the law, when no such thing as a compulsory sale could be decreed. Every party to the suit had under the decree a right to have a commission, and I do not think that this Act of Parliament has taken away that right.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *W. & J. Gibson;* Messrs. *Parker, Watney, & Clarke.*

L. JJ. 1875 June 11, 25.

In re CITY AND COUNTY BANK.

Company—Practice—Winding-up Petition—Statement of Interest of Petitioner—Advertisement—Mistake in Name of Company—Rule as to Seven Clear Days—Discretion of Judge—General Order of Nov. 1862, *rr.* 2, 53.

A winding-up petition by a shareholder of a company contained no allegation that the Petitioner had held his shares for six months before filing the petition:—

Held (affirming the decision of *Bacon*, V.C.), that the omission of this statement did not make the petition demurrable.

The registered name of the company must be accurately stated in the advertisement of a winding-up petition, otherwise the advertisement is invalid.

The advertisements of a winding-up petition were inserted only six clear days before the hearing, the day for hearing petitions having been changed

in consequence of the regular day being the Queen's birthday; but several of the contributories and creditors appeared at the hearing. The Vice-Chancellor dispensed with the necessity of publishing fresh advertisements, and made an order for winding up the company:—

Held, by the Lords Justices, that the Vice-Chancellor had properly exercised his discretion in dispensing with the advertisements, but the order for winding up was discharged under the circumstances, to enable the shareholders to meet and decide whether the company should be wound up voluntarily.

THIS was an appeal from an order made by Vice-Chancellor *Bacon* for winding up the *City and County Bank, Limited.*

The company was registered under the *Companies Act*, 1862, with a nominal capital of £500,000, divided into 100,000 shares of £5 each.

Shares had been subscribed for to the amount of £62,260, upon which £25,000 had been paid up.

The petition was presented by *William Hird*, a shareholder, who stated that he was the proprietor of ten shares, numbered respectively 4123 to 4132, upon which £2 10*s.* per share had been paid up; but he did not state how long he had been possessed of those shares.

The petition stated that by the last balance-sheet of the company it appeared that they had incurred liabilities to the amount of £95,889 or thereabouts, and that they had invested their assets in loans on bills, mortgages, and other similar securities, to the amount of £98,682; that the company had lately incurred heavy losses through bad debts on bills discounted, and that they were on the 15th of May then instant unable to pay cheques of their customers, and the same were returned, Messrs. *Brown, Janson, & Co.*, who had acted as the bankers of the company in the Clearing House, having refused to clear their cheques by reason of the company's account with them being overdrawn.

The petition stated that the company were unable to pay their debts as they became due, that they had ceased to carry on their business, and that by the loss of credit occasioned by the above-mentioned circumstances they would be unable to resume business.

The petition was filed on Wednesday, the 19th of May. In the ordinary course the petition would have come on for hearing on Saturday, the 29th of May; but as that day was kept as the

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Queen's birthday, and the Courts were closed, the Vice-Chancellor appointed the previous day, Friday, the 28th of May, for hearing petitions. Accordingly, the advertisements of the petition, which were inserted in the *Daily Telegraph* and *Standard* on the 20th of May, and in the *London Gazette, Daily News,* and *Standard* on the 21st of May, stated that the petition would be heard on the 28th of May.

In the advertisements inserted in the *Standard* and *Daily Telegraph* on the 20th of May, the name of the company was given as the "*City and County Banking Company, Limited,*" but the mistake was discovered, and on the following day the name was correctly given as the "*City and County Bank, Limited.*"

Two other petitions for winding up had also been filed by creditors in the Court of the Master of the Rolls on the 19th of May, and another by a creditor and contributory on the 20th of May in the Court of Vice-Chancellor *Malins;* but these petitions had been ordered to stand over to abide the result of *Hird's* petition.

On the 22nd of May Vice-Chancellor *Bacon* made an order appointing a provisional liquidator.

It appeared from the affidavits that a majority of the shareholders, and nearly all the creditors, desired to have a voluntary winding-up, and to carry out a projected arrangement with Messrs. *Brown, Janson, & Co.,* who had offered to take over the whole of the assets, and to pay the creditors in full. Shareholders, however, to the extent of 2700 shares, were stated to be in favour of a compulsory winding-up.

When the petition came on before the Vice-Chancellor, the following technical objections were taken to the petition:—First, that the Petitioner had not stated that he had held his shares for six months, in accordance with the 40th section of the *Companies Act,* 1867. Secondly, that in the advertisements issued on the 20th of May the company's name was not correctly given; and, thirdly, that the required advertisements in the *Gazette* and other papers were not inserted seven clear days before the petition was heard. On the merits, the directors asked that the petition might stand over to enable them to ascertain the opinion of the shareholders at a meeting which had been summoned for the 8th of June.

His Honour, however, overruled all the objections, and made an

order for winding up the company, with a direction that any person might apply to carry out the agreement with *Brown, Janson, & Co.* (1). From this order the company appealed.

(1) 1875. May 28. WN (1875) 108

SIR JAMES BACON, V.C., after stating that the company was admitted to be insolvent, thus disposed of the technical objections:—

There have been a variety of objections taken to this petition. It has been suggested that the time at which the petition comes on to be heard is not consistent with the rules laid down by the Orders. It is covered, in my opinion, abundantly by the authority given to the Court to dispense whenever it thinks right with the regulations as to the advertisements. If the objection had more weight in it than it has, arising only from the accidental circumstances that the Court will be closed because to-morrow is kept as Her Majesty's birthday, I should be very unwilling (having no reason to the contrary) to exercise that power which in terms is given to me to dispense with the regulation as to time. It is suggested further that this petition is demurrable, because it does not contain an allegation that the petitioner has had, for a period of six months mentioned in the statute, the shares in respect of which he claims registered in his name; and a variety of cases are referred to, such as *Braund* v. *Earl of Devon* (Law Rep. 3 Ch. 800), for the purpose of stating that of which there is no doubt, namely, that where it is necessary for a Plaintiff or Petitioner to shew a title acquired by him, and the manner in which he has acquired it, it is necessary that the facts should be alleged. But it does not follow that the absence of that allegation can be taken advantage of in all cases by demurrer. There is nothing on the face of the petition which invites a demurrer. An infant may file a bill without a next friend, although he cannot sustain it if his incapacity is objected to. A married woman without a next friend is in the same position. But if an infant of sixteen or eighteen years of age were to file a bill, and nothing appeared on it but the description of his *status* and the right which he claims, such a bill would not be demurrable. In my opinion, there is no ground whatever for saying that this petition is demurrable. In the mouth of the company of course it is answered readily by the production of their own register, because this petition may be understood to speak in the name of a person who is addressing the directors, who are persons in the same interest as himself. He serves the petition upon them, and he says, "I, your shareholder, desire such and such relief," and the register book which is his and theirs, is evidence of and allegation of title in respect of which he is suing. The creditors can make no such complaint; the other shareholders, in my opinion, can make no such complaint; in short, I think to hold that this petition, well founded in other respects, is to be turned out of Court on such an objection as that would be simple perversion of the administration of justice.

Another objection taken was that in the advertisements the company had been called the "banking company," instead of the "bank." That, in my opinion, is perfectly frivolous. Unless the misdescription could mislead anybody, it would not deserve a moment's consideration. If there was a suggestion that anybody might be misled, it would deserve to be examined into, and it would deserve attention, but no such suggestion has been made.

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Mr. *Little*, Q.C., and Mr. *E. Chitty*, for the Appellants:—

Our first objection to this petition is, that it does not state that the Petitioner had held his shares for six months before the filing of the petition. The *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 40, expressly enacts that no contributory shall be capable of presenting a petition for winding up a company unless his shares "were originally allotted to him, or have been held by him and registered in his name for a period of at least six months during the eighteen months previously to the commencement of the winding-up. The absence of a statement that he is qualified under this section renders the petition demurrable: *Braund* v. *Earl of Devon* (1); *In re Wear Engine Works Company* (2).

Mr. *Swanston*, Q.C., for the Petitioner, on this point referred to *In re Queen's Benefit Building Society* (3).

Sir W. M. James, L.J.:—

I think that this objection is one which cannot be taken by way of demurrer to the petition, but must be set up by the Respondents by way of answer. It is a fact within the knowledge of the company.

Sir G. Mellish, L.J., concurred.

Mr. *Little*, Q.C., and Mr. *E. Chitty*:—

The next point is that the name of the company was not truly stated in some of the advertisements, the company being called the *City and County Banking Company* instead of the *City and County Bank*. The registered name of a company is treated by the Legislature as a matter of great importance. It must be stated in the memorandum of association, and can never be altered afterwards except with the approval of the Board of Trade; and no two companies are allowed to have names identical with or closely resembling one another: *Companies Act*, 1862, ss. 13, 20. And as there are so many banking companies in *London*, it is obvious that any inaccuracy in the name in the advertisement may entirely mislead the creditors and contributors.

(1) Law Rep. 3 Ch. 800. (2) Law Rep. 10 Ch. 188.
(3) Law Rep. 6 Ch. 815.

A third objection to the petition is that the advertisements which had the right name did not appear seven clear days before the day when the petition was heard, as required by the General Order of November, 1862, Rule 2. It is true that by the 53rd rule the Judge has the power of dispensing with that rule; but if he acts under that rule, he ought to make a formal order to that effect, which the Vice-Chancellor has not done in this case. In the case of *In re Land and Sea Telegraph Company* (1), where the Vice-Chancellor exercised his dispensing power, one of the petitions had been regularly advertised; therefore all the shareholders had had fair notice. The proper course in the present case would have been to order the petition to stand over for fresh advertisements to be issued: *In re London and Westminster Wine Company* (2).

We also object that the Petitioner's interest is so small that the Court ought not to make an order at his suggestion against the wishes of the large majority of the shareholders and creditors: *In re London Suburban Bank* (3); *In re Professional, Commercial, and Industrial Benefit Building Society* (4).

Mr. *J. Pearson*, Q.C., Mr. *E. C. Willis*; and Mr. *Waller*, Q.C., and Mr. *W. Latham*, for various creditors of the company.

Mr. *Jackson*, Q.C., and Mr. *E. Cutler*, for a committee of shareholders.

Mr. *Dauney*, for Messrs. *Brown, Janson, & Co.*

Mr. *Swanston*, Q.C., and Mr. *Graham Hastings* (Mr. *Kay*, Q.C., with them), for the Petitioner:—

In the first place, with respect to the technical objections, exact accuracy in the name of the company is nowhere prescribed. Rule 1 says that the company is to be described in the petition "by its most usual style or firm;" and Rule 2 only prescribes that in the advertisement the name and address of the Petitioner and his solicitor shall be given. It is quite sufficient if the name was accurate enough for the public to identify the company. But this mistake was in fact immaterial; it was rectified in the advertisements of the following day on which the order was based.

(1) 18 W. R. 1150. WN (1870) 213
(2) 1 H. & M. 561.
(3) Law Rep. 6 Ch. 641.
(4) Ibid. 856.

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Then it is said that these advertisements were not inserted in time. But advertisements are only in lieu of service on the shareholders and others interested, and if the Judge thinks that they have in fact sufficient notice he can dispense with the advertisements under the 53rd rule, in the same way as he can in the ordinary practice in Chancery dispense with the prescribed length of notice. If the advertisements are delusive, and name a wrong day so that the shareholders may be deceived, they are void, and the Petitioner will be obliged to issue fresh advertisements, as in *In re London and Westminster Wine Company* (1), cited by the other side; but if the right day is named and all the parties interested appear, as they did in this case, the defect is cured and the petition is heard at once, as in *In re Land and Sea Telegraph Company* (2). In such a case it is not necessary that the fact of the Judge having exercised his discretion should appear on the face of the order.

[SIR W. M. JAMES, L.J. :—If there were an appeal to the House of Lords, and it did not appear in the order how the defect in the advertisements was cured, how could it appear that the Court had jurisdiction to make the order ?]

The appearance of all the parties interested gives the Court jurisdiction.

With respect to the merits of the case, although it is true that the Petitioner's interest is but small, he is supported by a large number of shareholders who wish the assets to be fairly got in and distributed. We believe that if that is done there will be a large surplus after all the debts are paid. We do not want to put anything into the hands of *Brown, Janson, & Co.*, who have no interest except to pay themselves.

SIR W. M. JAMES, L.J. :—

I am of opinion that the order of the Vice-Chancellor ought to be discharged, and that the Vice-Chancellor ought to have made the order which we are about to pronounce.

Several objections have been made to the petition, independently of the merits, and some of these objections were at first sight

(1) 1 H. & M. 561. (2) 18 W. R. 1150.

formidable. One of them, respecting the time during which the Petitioner had held his shares, was disposed of during the argument. With respect to the mistake as to the name of the company in the advertisement, I think that the description of the company as the *City and County Banking Company* instead of the *City and County Bank*, although it may appear a slight error, rendered the advertisements in which it occurred absolutely void. There can be no reason why when a company has a name any other name should be used instead of it. Where can the line be drawn? The name mentioned in the advertisement must be the correct name of the company. The mistake, however, was immediately discovered and set right in the succeeding advertisements.

Then there was the objection that the advertisements in the *Gazette* and the daily newspapers were not issued seven clear days before the hearing of the petition. The Vice-Chancellor considered that it was in his power to dispense with the necessity of issuing fresh advertisements. Such a power ought not to be exercised lightly; otherwise it would be equivalent to making a fresh order that six days are to be sufficient. There must be the exercise of a judicial discretion, and if that judicial discretion is exercised we ought not lightly to disturb it. In the present case the Vice-Chancellor did exercise such discretion. It was an accident arising from the fact of the Court being closed on the Queen's birthday, and the advertisement did have the effect of securing the representation of every class of persons interested before the Court. In other proceedings before this Court, if an applicant serves notice of his motion too late, and the other party appears, he is bound by the order. I think, therefore, the Vice-Chancellor was right in exercising his discretion in this case, and we cannot interfere with his conclusion.

This brings us to the real merits of the case. The company is a weak concern: and as it appears to me that the arrangement with *Brown, Janson, & Co.* is, on the face of it, a beneficial one, I see no reason why the assets should not be realized by them as economically as by a liquidator appointed by the Court. The Petitioner is a shareholder with a very small interest, and he says he is supported by shareholders holding 2700 shares, whose consent

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he has obtained by canvassing. All the other shareholders are desirous that no order should be made in the winding-up, and I am certainly not disposed to interfere with the wishes of the majority of the shareholders, who ought to determine what was best to be done. Creditors to nearly the full amount of the debts of the company have also expressed themselves as opposed to the order. Under these circumstances we ought not to ruin the company by a winding-up order—for it would ruin it if we were to make an order for compulsory winding up, and prevent them from carrying out the proposed arrangement. If the shareholders are able to make an arrangement with *Brown, Janson, & Co.*, or with any other persons, for the payment of the debts, we ought not to interfere with them.

The order of the Vice-Chancellor must be discharged, with liberty to the directors to summon a general meeting of the shareholders to consider the question of a voluntary winding-up, and to make such agreement with *Brown, Janson, & Co.*, or any other persons, as they may think desirable. In the meantime the Petition will stand over till the result of the meeting is known.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Harper, Broad, & Battcock;* Mr. *Edward Lee;* Mr. *F. Heritage;* Messrs. *Janson, Cobb, & Pearson;* Mr. *W. H. Roberts;* Messrs. *Vallance & Vallance.*

EBBS *v.* BOULNOIS.

L. JJ.
1875
June 10, 11, 25.

[1875 E. 20.]

Liquidation by Arrangement—Close of Liquidation—Discharge of Debtor—After-acquired Property—Joint and Separate Estates—Separate Creditors passing no Resolution—Bankruptcy Act, 1869, *ss.* 12, 15, 47, 48, 49, 125 *sub-ss.* 7, 9—*Bankruptcy Rules*, 1870, *r.* 285.

When the creditors of a liquidating debtor have passed a resolution granting him his discharge, his after-acquired property does not vest in the trustee, but belongs to the debtor, although no resolution closing the liquidation has been passed.

In re Bennett's Trusts (1) overruled.

Where proceedings for liquidation have been instituted by partners, and the joint creditors have passed a resolution for liquidation and appointed a trustee, the separate estate of each partner, as well as the joint estate, vests in the trustee so appointed; and if no resolution is passed by the separate creditors, the trustee must administer the separate estate according to the laws of bankruptcy. In such a case a discharge by the joint creditors will not operate to discharge any partner or his separate estate from his separate debts.

THIS was an appeal from a decision of the Master of the Rolls allowing a demurrer to the Plaintiff's bill.

The facts, as stated in the bill, were as follows:—

The Plaintiff, *Joseph Ebbs*, was formerly in partnership with *E. J. Ebbs* as builders at *Maida Hill*. On the 6th of June, 1871, the two partners filed a petition for liquidation by arrangement, and on the 28th of June their joint creditors passed a resolution agreeing to a liquidation, and resolving that certain persons should be appointed trustees, and that the discharge of the debtors should be granted forthwith. This resolution was duly registered.

Meetings of the separate creditors of the Plaintiff and *E. J. Ebbs* were duly summoned for the 28th of June, after the meeting of the joint creditors, but none of the separate creditors attended such meetings, and consequently no resolutions were passed.

On the 18th of July, 1871, the discharge of the two debtors was duly certified by one of the Registrars of the *London* Court of Bankruptcy.

(1) Law Rep. 19 Eq. 245.

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No resolution had been passed by the creditors fixing a time for the close of the liquidation at the time when the suit was commenced.

Shortly after the issuing of the certificate of discharge the Plaintiff recommenced his business as a builder.

On the 11th of July, 1874, the Plaintiff took a building lease of a piece of land at *Maida Hill* for a term of ninety-seven years, and built a house on it; and on the 27th of November, 1874, he entered into a written agreement with the Defendant for the sale to him of his interest in the house and premises for £1600. The Defendant objected to the title, on the ground that the liquidation of the Plaintiff's affairs had never been closed, and the Plaintiff accordingly filed the present bill, stating the above facts and praying that the agreement might be specifically performed. The Defendant demurred to the bill for want of equity. The Master of the Rolls, considering that he was bound by the decision of Vice-Chancellor *Bacon* in *In re Bennett's Trusts* (1), allowed the demurrer (2).

(1) Law Rep. 19 Eq. 245.
(2) 1875. May 3.

SIR G. JESSEL, M.R.:—

I give no opinion of my own at all as to the proper construction of this section of the *Bankruptcy Act*. I find before me, in the case of *In re Bennett's Trusts* (Law Rep. 19 Eq. 246), a decision of the Vice-Chancellor *Bacon*, who is the Chief Judge in Bankruptcy, deciding the very point; the point being this, that until the close of the bankruptcy or liquidation, according to the literal meaning of the 15th section of the *Bankruptcy Act*, 1869, all the property acquired during the continuance of the bankruptcy vests in the trustee. I cannot say that this case comes within either of the two exceptional cases in which I think it is allowable for a Judge to decline to follow a recent decision of a Court of co-ordinate jurisdiction. I think that he is not bound to follow a recent decision when it is contrary to the plain words of an Act of Parliament; but in the present case, whether I should or not have felt at liberty, having regard to the other sections, and to the extraordinary consequences which would follow from that decision, to come to another conclusion, I cannot say that the decision is against the plain meaning of the Act of Parliament. Nor, on the other hand, is it within the second class of exceptions which would authorize me to depart from a decision of a Court of co-ordinate jurisdiction, namely, that it is opposed to the current of authority—I mean either the authority of a higher Court, or several other decisions of Courts of co-ordinate jurisdiction, because it is admitted there is no other authority on the point. Therefore I shall act as I always do, and follow the decision of the Vice-Chancellor, leaving it to another Court, if another Court shall think fit, to overrule such decision. I allow the demurrer.

The Defendant appealed from this decision.

Mr. *Chitty*, Q.C., and Mr. *Daniel Jones*, for the Appellant:—

The bill states that the creditors have granted the debtor his discharge, and that makes him a free man, and capable of acquiring property without its being subject to the liquidation. The order is made under the 48th section of the Act, which is made applicable to a liquidation by the 9th sub-section of the 125th section (1). The close of the bankruptcy or liquidation, which is regulated by the 47th section, cannot take place until the whole of his property has been realized. Therefore, according to the contention of the Defendant, if the debtor has any reversionary or

(1) The material portions of the sections chiefly referred to are as follows:—

32 & 33 Vict. c. 71, s. 47: "When the whole property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can in the joint opinion of the trustee and committee of inspection be realized without needlessly protracting the bankruptcy, or a composition or arrangement has been completed, the trustee shall make a report accordingly to the Court, and the Court, if satisfied that the whole of the property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can be realized without needlessly protracting the bankruptcy, or that a composition or arrangement has been completed, shall make an order that the bankruptcy has closed, and the bankruptcy shall be deemed to have closed at and after the date of such order. . . ."

Sect. 48: "When a bankruptcy is closed, or at any time during its continuance with the assent of the creditors, testified by a special resolution, the bankrupt may apply to the Court for an order of discharge; but such discharge shall not be granted unless it is proved to the Court that one of the following conditions has been fulfilled, that is to say, either that a dividend of not less than ten shillings in the pound has been paid out of his property, or might have been paid except through the negligence or fraud of the trustee, or that a special resolution of his creditors has been passed to the effect that his bankruptcy, or the failure to pay ten shillings in the pound, has in their opinion arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him. . . ."

Sect. 125, sub-s. 9: "The provisions of this Act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement; but the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted, by a special resolution of the creditors in general meeting; and the accounts may be audited in pursuance of such resolution at such time, and in such manner, and upon such terms and conditions, as the creditors think fit."

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other property which cannot for the present be realized, he may be kept for years in a condition in which he is incapable of acquiring property or of carrying on any trade. The 48th section empowers the Court in case of bankruptcy, and the creditors in case of a liquidation, to avoid this hardship by giving the debtor a discharge before the close of the proceedings. If, as the Defendant contends, the order only operates to protect him from personal actions, it is superfluous, for he is already protected by the 12th section of the Act.

Mr. *Roxburgh*, Q.C., and Mr. *Creed*, for the Defendant:—

According to the allegations in the bill, the Plaintiff has no title to the property. By the 7th sub-section of the 125th section of the *Bankruptcy Act*, all the provisions of the Act are to apply, with the modifications mentioned in the 9th sub-section, to a liquidation by arrangement, in the same manner as if the word "bankrupt" included a liquidating debtor; and by the 15th section the property of a bankrupt divisible among his creditors is to comprise, amongst other things, all such property as may be acquired by or devolve on the bankrupt during the continuance of the bankruptcy. It cannot be denied, therefore, that this property vested in the trustee, unless there is something in the order of discharge to prevent it. The Act prescribes three processes: the discharge of the debtor, the close of the liquidation, and the release of the trustee. These are all in the discretion of the creditors, and are intended to be kept distinct. The discharge released the debtor from all proceedings against him on account of his debts, but it did not release his after-acquired property any more than it released the property which he had at the time of the liquidation. That could only be done by a resolution to close the liquidation. The express point has been decided in our favour by Vice-Chancellor *Bacon* in *In re Bennett's Trusts* (1). We rely upon the distinct words of the statute, that property devolving on the debtor during the continuance of the liquidation vests in the trustee; and the liquidation must be held to be continuing until it is formally closed.

But even if the property in question in this suit has been released from the joint debts, the bill does not shew that it is released

(1) Law Rep. 19 Eq. 245. Post p. 490

from the separate debts. The bill states that the separate creditors have never passed any resolution. The debtor has, therefore, obtained no discharge from them, and the property must be still vested in the trustee for their benefit.

Mr. *Chitty*, in reply:—

The point respecting the separate creditors was not taken in the Court below. In fact all the separate creditors have been paid; and, if necessary, we ask to amend the bill by stating that fact.

SIR W. M. JAMES, L.J.:—

The point raised before us is a very important one, and one upon which I have formed a very clear, decided, and unhesitating opinion, which, as I understand, is in accordance with that of the Master of the Rolls, although it is adverse to the decision which he felt himself bound by the authority of the case before Vice-Chancellor *Bacon* to pronounce. The Vice-Chancellor had expressed an opinion that the property belonged to the trustee in the liquidation, on the ground that the close of the liquidation was one thing and the granting of the order of discharge another thing. I agree with the Vice-Chancellor's premises, but I think that his conclusion does not follow from his premises. The argument on the one side is, that discharge means discharge, and that cannot be controverted; the argument on the other side is, that continuance means continuance, which is equally incontrovertible. No doubt one section of the Act says that all property during the continuance of the bankruptcy vests in the trustee; and another clause says that during the continuance of the bankruptcy the debtor may be discharged either by the Court or by his creditors from all his debts with certain exceptions, which must mean that he is to be a free man as to all the others.

It would be a monstrous conclusion if the contention of the Respondent were to prevail. According to that view, if a debtor gave up to his creditors his property worth half a million of money, and it happened to be detained in Court for years by the existence of a long Chancery suit, and for that reason the assets could not be realized, in such a case as that the debtor must remain a pariah and an outlaw, incapable of acquiring any property, except his

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wearing apparel, until the bankruptcy or the liquidation should be closed. If he were a lawyer he could not buy a library; if he were an actor he could not purchase the necessary wardrobe for the performance of his parts, but must be kept for years in that position; while a man who had left himself with bare poles, and with nothing to come to his creditors, could have his bankruptcy closed at once, and would be entitled to an immediate discharge from his creditors.

It would be very startling if that were the intention of the Legislature. But the solution of the difficulty is clear if you look at the Act. The Act expressly provides that during the continuance of the bankruptcy the debtor may apply for a discharge, and by a discharge it means a discharge with all its consequences. The enactment in sect. 15, that all property is to vest in the trustee during the continuance of the bankruptcy, must be read as if it were expressly made "subject to the proviso hereinafter contained in the 48th section." Common sense must be applied to reconcile the two enactments. It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other. In the present case there is no difficulty in reconciling the two sections. I think, therefore, that the decision of the Master of the Rolls must be reversed.

Another question was raised as to the validity of the order of discharge as regards the separate debts of the Plaintiff. The case must stand over to ascertain whether there are any separate creditors; and if there are, it can be re-argued on that point.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I agree that the question is one of great importance, but it is not new to my mind. I considered it a good deal in the case of *Ex parte Russell* (1), but it was not necessary for us to decide the point in that case. I have no doubt that, both in bankruptcy and liquidation, when the debtor has obtained his order of discharge, he is freed from all debts (except those specially excepted by the 49th section), and that his future

(1) *Ante*, p. 255.

assets then belong to him. I quite agree that the 15th section says in plain terms that all property acquired by the bankrupt during the continuance of the bankruptcy shall vest in the trustee, and I also agree that the bankruptcy continues till it is formally closed, and, unless the 15th section were modified by some proviso, until the bankruptcy was closed all the assets acquired by the bankrupt would go to his creditors. Under the 47th section the Court has no power to close the bankruptcy until either all the property of the bankrupt has been realized, or so much as can be realized without needlessly protracting the bankruptcy. So, if the argument of the Respondent is correct, no bankrupt, even with the consent of his creditors, and although he had paid twenty shillings in the pound, could hold any property until the whole of his assets have been realized; that would be a very novel and extraordinary provision. However deserving the bankrupt may be, though all his creditors wished to set him free and the Court thought it just to do so, if he had an estate which could not immediately be realized, and which might perhaps take years to realize, it would be impossible to set his future property free. By deciding against this construction we shall not be diminishing the powers of the creditors, but increasing them; for if this construction be the true one, the creditors have no power to allow the debtors to start again in trade if they should wish to do so.

What, then, does the 49th section mean by saying that an order of discharge shall release the bankrupt from all ordinary debts proveable under the bankruptcy? It must mean that he is to be in the same position as if the creditors had actually released him. If they had done so, could they have claimed that his personal earnings and other property subsequently acquired by him should be applied in payment of their debts? The plain and natural meaning of the words is, that his future property is to be his own. The first clause of the 48th section shews that when the bankruptcy is closed the debtor may obtain his discharge almost as a matter of course, but that even during its continuance, under certain circumstances, he may obtain it. Can it be meant that if he obtains it the only effect will be that no action can be brought against him by the creditors until the bankruptcy is closed? It is treated as a great boon to him, but it would be no boon if the Respondent is

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right, because the Court will always restrain actions brought against the debtor in any stage of the bankruptcy. It must have been intended that he should be absolutely released from all his debts, and that his after-acquired property should be released also. I am, therefore, of opinion that in this case the property in question is released from the liquidation, and is the property of the Plaintiff.

June 25. The matter came on again this day upon the point reserved.

Mr. *Chitty*, Q.C., and Mr. *D. Jones*, for the Appellant:—

We have ascertained that in fact all the separate creditors have been satisfied, and we are prepared to amend the bill by making a statement to that effect. But we contend that we are entitled to have the demurrer overruled without doing so. Even if there are separate debts unpaid, the debtor's property is not affected, and he can make a good title to it. The proceedings are regulated by Rule 285 of the *Bankruptcy Rules*, 1870 (1). Under that rule the alternatives of the separate creditors determining on a bankruptcy, a liquidation, or a composition, are provided for, but the alternative of their not passing any resolution is not provided

(1) Rule 285: "In cases of proceedings for liquidation by arrangement or composition instituted by partners, separate meetings of the different classes of creditors shall be held. . . . . The joint creditors may come to such resolution as they may think fit with regard to the joint estate, the separate creditors may also come to such resolution as they may think fit as regards the liquidation of the estate of their individual debtor, but in the event of their determining upon his bankruptcy, or the liquidation of his estate by arrangement, they shall choose the same trustee, if any, as has been or shall be appointed by the joint or partnership creditors, but they may appoint a committee of inspection from their own body if they think fit, or they may adopt the committee (if any) appointed by the joint or partnership creditors. In the event of the separate creditors of any such debtor agreeing to accept a composition, in cases where the joint creditors have resolved on a liquidation by arrangement, the assets of such separate debtor shall be made available by the trustee for or towards the payment thereof, in such manner as the Court shall direct and approve, and any surplus of such separate estate remaining in the hands of the trustee after payment of or provision for such composition, and all proper costs incurred in connection therewith, shall be deemed partnership assets."

for. It is clear, therefore, that the proceedings, so far as the separate creditors are concerned, must be altogether abortive. No resolution for liquidation or composition can be passed except at the first meeting, and as that was not done in this case the separate creditors have no power now to give a discharge or to pass any other resolution, but the debtor is in the same position with regard to them as if he had presented no petition at all. The separate creditors cannot now take advantage of the petition for liquidation as an act of bankruptcy because more than twelve months have elapsed. They may bring actions against the debtor for their debts, but that will not affect his property in the hands of a purchaser.

Mr. *Roxburgh*, Q.C., and Mr. *Creed*, for the Defendant:—

There is no allegation in the bill that there were no separate creditors, or that all the separate creditors have been paid off. We are therefore entitled to succeed in our demurrer. But even if the bill is amended, and such an allegation is introduced and proved to be true, the Plaintiff cannot make a good title to the property. Both in a bankruptcy and a liquidation the separate as well as the joint estate of a debtor vests in the trustee: *Bankruptcy Act*, 1869, s. 15, sub-s. 3; and s. 125, sub-s. 5. This has been expressly decided, in the case of a liquidation, by the Chief Judge in *Ex parte Philps* (1). Therefore, in the present case, as soon as the joint creditors passed a resolution for liquidation and appointed a trustee, the joint and separate estate of the debtor vested in the trustee appointed by them. If the separate creditors had also met and passed a resolution, they must have appointed the same trustee, and he would have administered both estates. This is expressly decided by the 285th rule, and the rule then proceeds to provide that if the separate creditors agree to a composition, the trustee appointed by the joint creditors shall apply the separate assets in payment of the composition, and that the residue shall be considered partnership assets. It is clear, therefore, that the failure of the separate creditors to meet did not render the proceedings abortive as to the separate estate, but that the separate estate vested in the trustee for their benefit,

(1) Law Rep. 19 Eq. 256.

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and, subject to their claims, for the benefit of the joint creditors. If so, what has taken place to divest it again, or to prevent the after-acquired separate estate from also vesting in him? He still holds it for the benefit of the separate creditors, although the joint creditors may have released it from their claims by the order of discharge.

Mr. *Chitty*, in reply.

SIR W. M. JAMES, L.J.:—

I think that such grave doubts have been raised as to the construction of the Act and the Rules that we cannot, as the matter now stands, force the title on a purchaser. If the separate creditors of a member of a partnership come to no resolution on a petition for liquidation presented by the partners, what is the result as respects the separate estate? The plain meaning of the words of the 15th section, is that all the joint and separate property vests in the trustee for distribution—the joint property among the joint creditors, and the separate property among the separate creditors. We have already held that the joint creditors have discharged the property from their debts; there is, therefore, no trust for them, but only for the separate creditors. We are told that the Plaintiff can, if he is allowed to amend his bill, shew that all the separate creditors have been satisfied. If that be so, the estate of the trustee is only a legal estate, and if there are no joint creditors and no separate creditors the trustee has become a trustee for the Plaintiff alone, and must convey the property as he may direct. It is, in fact, an outstanding legal estate which must be got in by the vendor. We must therefore allow the demurrer, with leave to the Plaintiff to amend by stating that all the separate debts have been paid. There will be no costs of the appeal.

SIR G. MELLISH, L.J.:—

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I am of the same opinion. I think it is tolerably clear, as decided by the Chief Judge in *Ex parte Philps* (1), that on the appointment of a trustee by the joint creditors the separate as well as the joint estate vests in the trustee. That is the natural meaning of the

(1) Law Rep. 19 Eq. 256.

words of the Act, and is assumed by the 285th rule, which directs the trustee of the joint creditors to apply the separate estate in payment of the composition for the separate debts. If the estate is so vested in him, how is it got from him again? It cannot be that the discharge by the joint creditors is sufficient to free the future separate property from the separate debts. The meeting of the joint creditors is to be held before the meeting of the separate creditors, and it is quite usual for the discharge to be first granted by the joint creditors at their meeting, and by the separate creditors at their meeting immediately afterwards. It is impossible to suppose that the joint creditors at their meeting could pass a resolution discharging the debtor from the separate debts. If the separate creditors pass a resolution themselves, there is no difficulty. If they pass none, I am not prepared to say what all the consequences would be. It is, however, clear that before six months have expired they may make the debtor a bankrupt upon the act of bankruptcy committed by presenting the petition for liquidation, and that the separate creditors have a charge on the separate assets. The result is that in cases where the separate estate is insolvent as well as the joint estate, the separate creditors naturally meet and pass a resolution; but they do not meet when the debts are small and the assets sufficient to pay them in full. In such a case there is no reason why they should meet, for they know that the trustee cannot deal with the separate estate without paying them in full. On the whole, the inclination of my opinion is, that on the allegations of this bill, as they now stand, there has been no discharge by the separate creditors; and that the property in question in the suit is still vested in the trustee. The demurrer must therefore be allowed, with liberty to the Plaintiff to amend.

Solicitor for the Appellant: Mr. *Oliver Richards.*
Solicitors for the Respondent: Messrs. *Allen & Edwards.*

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1875
July 3.

In re BENNETT'S TRUSTS.

Bankruptcy—Liquidation by Arrangement—Close of Liquidation—Discharge of Debtor—Bankruptcy Act, 1869, *ss.* 12, 15, 47, 48, 125, *sub-ss.* 7, 9.

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When the creditors of a liquidating debtor have passed a resolution granting him his discharge, his after-acquired property does not vest in the trustee for the benefit of the creditors, but belongs to the debtor; although no resolution fixing the close of the liquidation has been passed:—

Decision of *Bacon*, V.C., reversed.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1).

On the 22nd of August, 1872, *Charles John Mold* filed a petition for liquidation by arrangement in the County Court of *Chesterfield*. At the first meeting of his creditors, which was held on the 16th of September, a resolution was passed agreeing to the liquidation and appointing a trustee: and that the discharge of the debtor should be and the same was thereby granted on the 1st of December then next.

On the 13th of January, 1873, the debtor became entitled to a legacy of £1000 bequeathed to him by the will of *J. B. H. Bennett*. The trustees of the will paid the money into Court under the *Trustee Relief Act*, and the debtor presented a petition to take it out of Court, which was opposed by the trustee in the liquidation, who claimed it on behalf of the creditors.

No resolution for the close of the liquidation or for the release of the trustee had been passed by the creditors.

The Vice-Chancellor held that the trustee was entitled to the fund, on the ground that the liquidation was not closed. The debtor appealed from this decision.

Mr. *De Gex*, Q.C., and Mr. *G. W. Lawrance*, for the Appellant, referred to *Ebbs* v. *Boulnois* (2), which had been decided since the order had been made in the present case.

Mr. *Little*, Q.C., and Mr. *Everitt*, for the trustee, said that in

(1) Law Rep. 19 Eq. 245.

(2) *Ante*, p. 479.

the face of that decision they could not support the order of the Vice-Chancellor.

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The LORDS JUSTICES accordingly discharged the order appealed from, and declared the Appellant entitled to the fund in Court. Under the circumstances of the case they ordered the costs of all parties, both of the appeal and of the hearing before the Vice-Chancellor, to be paid out of the fund.

Solicitors: Messrs. *Torr, Janeway, & Co.*; Mr. *Braikenridge.*

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L. JJ. 1875 June 26.

[1875 G. 96.]

Vendor's Lien for Goods—Payment by Acceptances—Wharfinger's Certificate—Document of Title—Custom of Trade—Payment into Court—Keeping Fund in medio.

B. & Co. sold some iron rails to the *A. Company* by a written contract stipulating that payment should be made by buyers' acceptances of sellers' drafts against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment. As the wharfinger's certificates were delivered the *A. Company* accepted the drafts of *B. & Co.*, according to the contract, which *B. & Co.* negotiated; but the rails remained in *B. & Co.'s* possession. The Plaintiff advanced money to the *A. Company* on the security of some of the wharfinger's certificates which were handed over to him with a written memorandum. The *A. Company* became insolvent, and their acceptances were consequently not paid. The Plaintiff filed a bill against *B. & Co.* and the receiver of the estate of the *A. Company*, claiming a lien on the rails in the hands of *B. & Co.* in priority to their lien as vendors. The bill alleged that according to the custom of the iron trade, the wharfinger's certificates were in fact "warrants." The Plaintiff having moved for an injunction to restrain *B. & Co.* from parting with the rails, or with the money which they might receive in respect of them, the Vice-Chancellor ordered *B. & Co.* to pay the value of the rails into Court, to be kept *in medio* till the decision of the case:—

Held, first, that the giving of the acceptances in pursuance of the contract was not an absolute payment, but conditional on the acceptances being met; that upon the insolvency of the acceptors the vendors' lien on the goods revived; and that the fact of the vendors having negotiated the bills made no difference.

Secondly, that the wharfinger's certificates were not documents of title, and their delivery passed no right to the goods; and that no custom of trade

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could give them the effect of "warrants" or documents of title as against the vendors.

An order to bring a fund into Court to remain *in medio* ought not to be made upon a mere allegation in the bill that there is a question to be tried at the hearing.

Decision of *Bacon*, V.C., reversed.

THIS was an appeal from an order of Vice-Chancellor *Bacon*.

On the 1st of August, 1874, Messrs. *Richard Fothergill* and *Ernest T. Hankey*, carrying on business at *Aberdare* as the *Aberdare Iron Company*, entered into a contract with Mr. *P. J. Goubonin*, for himself and the *Ural Railway Company* in *Russia*, for the supply of a quantity of iron rails, of which 7000 tons were to be delivered at *Cronstadt* by the end of May, 1875, 7000 tons by the end of June, and 7000 tons by the end of July.

To enable them to carry out this contract the *Aberdare Iron Company*, on the 20th of November, 1874, entered into an agreement with *Bolckow, Vaughan, & Co.*, a limited company at *Middlesborough-on-Tees*, to manufacture for them 2000 tons of rails. The contract contained the following stipulation:—

"The rails to be made in the months of December and January next, and the whole to be shipped at the commencement of the first open water at *Cronstadt*. Fourteen days' notice to be given before commencement of manufacture, in order that the inspector may be present. Payment to be made by buyers' acceptance of sellers' drafts at six months' date against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment."

Another contract in similar terms was entered into between the same parties on the 23rd of December, 1874, for a further quantity of 2000 tons of rails in the months of January and February, 1875.

Under these contracts *Bolckow, Vaughan, & Co.* commenced to manufacture iron rails, which, when made, were approved and stacked at the works of *Bolckow, Vaughan, & Co.*, and the wharfinger's certificates, with the certificates of the inspector appointed by the Russian company, attached, of each 500 tons ready for shipment, were given at different dates in December and January, the whole 4000 being ready for shipment by the 26th of

January, 1875. The wharfinger's certificate was in the following form:—

"I hereby certify that there are lying at the works of Messrs. *Bolckow, Vaughan, & Co., Limited,* of *Middlesbrough*, 500 tons of iron rails which are ready for shipment, and which have been rolled under contract dated November 20, 1874, between the said company and the *Aberdare Iron Company.*

"*W. Roe*, Wharfinger."

These wharfinger's certificates, with the inspector's certificates attached, were, as they were signed, delivered to the *Aberdare Company* in exchange for acceptances by the *Aberdare Company* of drafts by *Bolckow, Vaughan, & Co.* at six months' date. These drafts were for sums amounting together to £32,000, and were to fall due at various dates in June, July, and August, 1875. The acceptances were negotiated by *Bolckow, Vaughan, & Co.*, and came into the hands of *bonâ fide* holders.

On the 5th of February, 1875, the *Aberdare Company* entered into an agreement with Mr. *G. B. Toms* that he should advance them £21,000, and signed a memorandum in the following form:—

"It having been arranged to-day that you advance us £21,000 against warrants of about 3000 tons Russian rails which we have to ship during the opening of the navigation this year, by your accepting our drafts with about four months to run, we herewith inclose warrants dated 28th December, 4th and 26th January, with inspector's certificates attached; and our drafts as follow," &c.

With this memorandum the *Aberdare Company* handed to *Toms* three of the wharfinger's certificates for the iron rails which were referred to as "warrants," and *Toms* accepted the drafts accordingly.

The bill contained an allegation that "the warrants referred to in the last-mentioned agreement were in fact three of the wharfinger's certificates hereinbefore referred to; and such certificates, according to the custom of the iron trade in similar cases, are, in fact, warrants."

A similar agreement, with a further deposit of wharfinger's certificates, was made between the same parties on the 3rd of March, 1875, for further acceptances to the amount of £7000.

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On the 15th of March, 1875, *Toms* died, and the Plaintiff in the suit was his administrator.

On the 22nd of May the Plaintiff gave notice to *Bolckow, Vaughan, & Co.* that he claimed a lien on the iron rails, for which he held warrants issued by them. In reply, *Bolckow, Vaughan, & Co.* said that they had issued no warrants for the rails, and that they could not in any way recognise the Plaintiff in the matter.

On the 5th of June, 1875, the *Aberdare Company* filed a liquidation petition, and Mr. *Turquand* was appointed receiver of the property. Two of the bills accepted by them had become due, and had been dishonoured. The others had not yet become due.

The Plaintiff, in his bill, claimed a lien on the iron rails mentioned in the certificates, for the sum of £28,000 advanced by him, and upon all moneys received or to be received by *Bolckow, Vaughan, & Co.*, or by *Turquand*, under the contract with the *Aberdare Company;* and prayed an injunction to restrain *Bolckow, Vaughan, & Co.* from parting with the iron rails without first satisfying his lien.

The bill also alleged that the *Ural Railway Company* had opened a credit with the Russian Bank of Foreign Trade in *Lombard Street* in favour of the *Aberdare Company*, and an injunction was asked to restrain the bank and *Turquand* from paying any moneys received under the contract without first satisfying the Plaintiff's lien.

The Plaintiff moved for an injunction in terms of the prayer. The Vice-Chancellor was of opinion that the Plaintiff was entitled to the injunction, but it was arranged that, subject to the right of appeal, the Russian contract should be carried out, and the money received under it should be paid into the *National Provincial Bank* in the joint names of the receiver and a nominee of *Bolckow, Vaughan, & Co.* (1).

(1) 1875. June 24.

SIR JAMES BACON, V.C.:—

This case is one of very great importance and of some nicety, because it is distinguishable from several of the cases which have been referred to in the course of the argument. The only thing upon this motion for injunction that I have to consider is how an order can be made which shall protect whatever may be ultimately determined to be the rights of the parties without doing any mischief in the meantime. The Plaintiff relies on these terms in the written contract between *Bolckow*,

From this order *Bolckow, Vaughan, & Co.* appealed.

Mr. *Jackson*, Q.C., Mr. *Millar*, and Mr. *Maclaren*, for the Appellants :—

The effect of the Vice-Chancellor's order is to lock up £32,000 of our money for an indefinite time, which may produce irrepa-

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Vaughan, & Co. and the *Aberdare Company*, "Payment to be made by buyers' acceptance of sellers' drafts at six months' date against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment." It is not disputed that acceptances were given, the dates of which are stated in the bill.

Now for the moment to lay aside authorities, what can be the meaning of these dealers in iron who enter into this written contract? The *Aberdare Company* had a contract with the Russian Government, under which the company were bound to supply the Russian Government with certain rails. They buy those rails of *Bolckow, Vaughan, & Co.* by the contract, one of the clauses of which I have read. The shipment is to be made at the commencement of the first open water at *Cronstadt*. The first of the bills that was given in payment would not become due until the 21st of this month of June. What can be the meaning of these words, "payment to be made by buyers' acceptance?" When the *Aberdare Company* delivered their goods in *Russia* they were to receive the money, but they were not to pay any part of it until the month of June arrived.

Mr. *Kay* has argued upon another part of the case that the documents in their nature were transferable, and capable of creating a right against the Plaintiff's interest. But the real transaction between the parties is that *Bolckow, Vaughan, & Co.* say, "You are to give us the acceptances against the two certificates, one by an inspector of the Russian Government that the iron has been rolled and that it is of proper weight, and the other the wharfinger's certificate that those things which were so rolled to the approbation of the inspector are lying on our premises ready for shipment." If the contract had been carried on without interruption, probably all the rails would have been delivered long before the first of the bills of exchange became due. The Plaintiff asserts that such documents as were passed to him by way of equitable charge are, according to the custom of the trade, negotiable instruments, at least to this extent, that they are capable of transferring to the person who receives them and advances his money, or comes under obligations in respect of them, that interest which the memorandum itself purports to convey.

I can see nothing unreasonable in the nature of the contract. It is not necessary to dispute on this occasion whether *Bolckow, Vaughan, & Co.*'s lien as unpaid vendors remains or not, for the injunction does not seek to obstruct that lien in any degree. There may be left out of consideration all the doctrine about stoppage *in transitu*, with all the doubts that beset it. Except in the passage which Mr. *Jackson* read to me from the decision in *Wentworth* v. *Outhwaite* (10 M. & W. 436), it has never been raised as a question whether the lien remains, or

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rable injury to us in our business: and this, too, on allegations of a special custom of trade which are entirely unsupported by evidence. The wharfinger's certificate is not a document of title,

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whether the non-payment of the price has the effect of rescinding the contract. The question is of the greatest importance at all times, and in this case of bankruptcy it is of the most vital importance; for the contract with the Russian Government may have been so advantageous to the estate which is in liquidation that the trustee or receiver, or anybody else interested, would readily produce money sufficient to pay *Bolckow, Vaughan, & Co.*, in order that they might get the benefit of this contract with the Russian Government. These are questions between the Russian Government and the Plaintiff, and have to be determined in this cause. What means have I of determining them now? It is impossible by any decision I could pronounce on this question of injunction that I could decide anything without anticipating that which can only be properly determined when the cause is brought to a hearing, when the proper evidence has been given on the subject of that custom, a very important matter, upon which the parties are at issue. I find that the stipulations of the agreement are admitted to have been fully performed up to the extent of having the inspector's certificate and the wharfinger's certificate; and although this can be merely guessed at, I find that upon the inspector's certificate is a signature under it, which I take to be that of *Bolckow, Vaughan, & Co.'s* resident manager. If so, they were parties to this certificate of the inspector. The wharfinger's certificate has been read several times in the course of the discussion, but the effect of it only is that the materials there mentioned, which have been rolled under the contract between *Bolckow, Vaughan, & Co.* and the *Aberdare Iron Company*, are ready for shipment. I have no means of deciding the main and most important question. I have no intention of interfering with the lien of the unpaid vendor, because I cannot do that. I have still less inclination to say that the contract has been rescinded, because the passage to which I have before referred shews that the law in some degree is unsettled upon that subject. I cannot say I think that was the intention of Mr. Baron *Parke*, for I find him saying also that the recent authorities and the inclination of his own opinion was that the contract was not rescinded, and all the justice and all the good sense, as far as I can perceive at this moment, are in favour of that proposition.

Having, then, as I have said, no intention to prejudice that question about the vendor's lien, which the vendor has a right to have decided in this Court, and which I am bound to leave undecided and unaffected by anything that I do, it remains only to be considered whether anything else can and ought to be done. Now that something ought to be done seems to me to be inevitable. It would be unreasonable that the receiver in the liquidation should be able to receive from the government of *Russia* that sum of money which can only be paid to him as representing the estate, and if he does justly represent the estate that ousts the Plaintiff's claim altogether. The Plaintiff would only be a creditor of the estate. I cannot do that. But if the parties like for themselves to

and no custom of trade, even if such a custom were proved, can make it so. It is nothing more than a certificate from our own servant that the goods have been manufactured and are ready for delivery. It does not purport to be an order for delivery. We claim the ordinary vendor's lien on the goods, which lien we have never lost. It is true that we took the acceptances of the purchasers in payment for the goods, but when the bills were dishonoured our lien as vendors revived: *Ex parte Chalmers* (1); *Griffiths* v. *Perry* (2); *Wentworth* v. *Outhwaite* (3); *M'Ewan* v. *Smith* (4); *Schotsmans* v. *Lancashire and Yorkshire Railway Company* (5); *Townley* v. *Crump* (6).

SIR W. M. JAMES, L.J., referred to *Pooley* v. *Budd* (7).

come to an arrangement, I can facilitate that, and will by all the means in my power do so; and although it may be inconvenient to Messrs. *Bolckow, Vaughan, & Co.* to have the price tied up until the question can be decided, that is a matter they must consider for themselves. I do not feel that I have any power to deal with the money or with the proceeds of the contract, or to interfere with the views which the parties may take of their rights under those contracts.

The bill states, I think quite fairly and reasonably, that *Goubonin* and the *Ural Railway Company*, who represent the Russian Government, have opened a credit with the *Aberdare Iron Company*, and that *Turquand* intends to pay the moneys which will be payable under the contract to the Defendants *Bolckow, Vaughan, & Co.*, without first satisfying the Plaintiff's charge, in which case he will sustain a great injury. It alleges that the rails remain in the possession and control of *Bolckow, Vaughan, & Co.*, and that they intend, with the privity and assent of *Turquand*, to ship the same to *Russia*. That is not the vendor's lien—that is rescinding the contract of *Bolckow, Vaughan, & Co.* with the *Aberdare Company*. Whether the Plaintiff has that lien which he insists upon is a question to be decided at the hearing, and a question of very considerable difficulty in my mind. The doctrine of stoppage *in transitu* has nothing in the world to do with this case, as Lord *Campbell* said in *M'Ewan* v. *Smith* (2 H. L. C. 309, 328). Although I think that the doctrine of the law of stoppage *in transitu* is well established, and if there had been in this case, as there is not, and as there was not in *M'Ewan* v. *Smith*, any *transitus* commenced, there might be questions arising out of that. But there is no such thing. With the strongest desire that nothing now done should prejudice the rights of any party, and that the matter should remain for future decision, I must grant the injunction.

(1) Law Rep. 8 Ch. 289.
(2) 1 E. & E. 680.
(3) 10 M. & W. 436.
(4) 2 H. L. C. 309.
(5) Law Rep. 2 Ch. 332.
(6) 4 A. & E. 58.
(7) 14 Beav. 34.

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Mr. *Kay*, Q.C., and Mr. *Locock Webb*, Q.C., for the Plaintiffs:—

All that the Vice-Chancellor has done is to order the value of the rails to be placed *in medio* until the questions raised in the suit have been determined. We say it is a question which fairly arises on the fact whether the transaction did not amount to a contract by *Bolckow, Vaughan, & Co.* that they would take acceptances of the *Aberdare Company* in satisfaction of payment, and that on such acceptances being given their lien as vendors should be at an end. The question whether an absolute or conditional payment was intended when acceptances are taken, is a question for a jury: *Goldshede* v. *Cottrell* (1); and if an absolute payment is intended, the vendor's lien will not revive on the bill being dishonoured: *Benjamin* on Sales (2). In this case, by the negotiation of the bills *Bolckow, Vaughan, & Co.* were estopped from saying that the payment was conditional: *Horncastle* v. *Farran* (3); *Bunney* v. *Poyntz* (4). With respect to the wharfinger's certificates, we contend that they were equivalent to warrants, and we are entitled to prove that they are so by giving evidence of the custom of the trade. If such certificates had been given to a factor, he would have had power to pledge the goods: *Farina* v. *Home* (5).

Mr. *De Gex*, Q.C., and Mr. *Robinson*, Q.C., for the receiver of the estate of the *Aberdare Company*.

Mr. *T. L. Wilkinson*, for the Russian company.

Mr. *Jackson*, in reply:—

In *Bunney* v. *Poyntz* the conditional payment had been converted into an absolute payment.

SIR W. M. JAMES, L.J.:—

In this case I am of opinion that the order of the Vice-Chancellor cannot be sustained.

With reference to the point which was pressed very much upon us both by Mr. *Kay* and by Mr. *Locock Webb*, that the effect of

(1) 2 M. & W. 20.
(2) 2nd Ed. pp. 598, 684.
(3) 3 B. & A. 497.
(4) 4 B. & Ad. 568.
(5) 16 M. & W. 119.

the order is only to keep things *in medio* until the right is determined, the keeping of £32,000 *in medio* may be absolute ruin to a mercantile firm. *Bolckow, Vaughan, & Co.* may be, and no doubt are, persons to whom the keeping of £32,000 *in medio* may be very little more than keeping a few shillings *in medio* to some other persons; but supposing the same order had been made against the *Aberdare Iron Company*, it might very possibly have been the very cause of that failure which we know to have ensued. Stopping £32,000 to a manufacturer may really be of the most serious consequence, and therefore an injunction is not to be granted on the ground that it is merely keeping things *in medio* for a certain time, and only on the allegation by the Plaintiff that there is a question to be tried. The Court must see, under those circumstances, whether there is really anything to be tried.

First of all, it is supposed that the right of a vendor in an ordinary case of stoppage *in transitu* or vendor's lien is interfered with by the allegation of the custom of the trade. The whole equity of this bill, the whole thing which is supposed to make this case differ from what would be the ordinary case between vendors and purchasers who have paid for their goods in bills of exchange, is this—that it is said that such certificates, according to the custom of the iron trade in similar cases, are in fact warrants. To say that is in truth to say a thing which cannot be. No custom of the trade can make a certificate a bill of exchange or a warrant. What is evidently meant by that allegation, giving the most liberal interpretation to it in favour of the pleader, is that people deposit the certificates as if they were warrants. That is really what it comes to. Everybody knows that warrants are things warranting a wharfinger, or warranting somebody else who has possession of the goods, to deliver them. The owner of the goods gives an authority to the person who is the bailee of the goods to deliver them. That is what is meant by a warrant. Such warrants are constantly dealt with, and if they are negotiable they are properly and validly dealt with as a security. And what is meant by saying that such certificates, according to the custom of the iron trade in similar cases, are in fact warrants, can only be this, that persons lend money upon certificates in the same way as they would lend money upon warrants. They may lend money as

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much as they like, but that cannot alter the nature of the documents. No practice of the persons who have got those certificates, and money lenders as between them, would in any way affect the manufacturer, unless you can shew the manufacturer has in some way authorized something to be done. What he has agreed to do is to be found in his contract, and the only question is what the legal rights are under this contract, and whether anything has occurred as far as the manufacturers are concerned, whether they have put their names to or done anything, which has in any way interfered with their legal right. It appears to me that this is to be tried exactly as it would be tried in an action of trover at law, in case the purchaser, or the purchaser's assignee, had brought such an action. Of course the Plaintiff *Gunn*, being only an equitable mortgagee, only a mortgagee by deposit, could not have brought it in his own name, but he could have brought it in the name of the *Aberdare Company*. It appears, therefore, to me to be a mere question depending on the legal right to these goods, upon which the Lord Justice will express his opinion.

SIR G. MELLISH, L.J.:—

There are, as I understand, two questions to be tried, according to the argument of the Respondents, and they say that the fund ought to be placed *in medio* until those questions are tried.

Mr. *Kay* contends that it will be a question of fact to be tried at the hearing, whether those acceptances were taken by the vendors, *Bolckow, Vaughan, & Co.*, in absolute satisfaction of the debt due from the purchasers for the iron, so that the vendor's lien would not revive upon the purchasers becoming insolvent, and giving public notice that they were insolvent; and, secondly, it is contended that the wharfinger's certificate is a document of title representing the goods, so that when that document of title is pledged by the person to whom it is given with a mortgagee, it will, either at law or in equity—he could hardly contend seriously that it would do so at law—but either at law or in equity it will give a charge upon the goods which will be superior to the vendor's lien.

Now, in my opinion, as to the first question, it depends entirely upon the construction of the contract, and there is no question of

fact to be tried at the hearing respecting it. The contract is as follows :—[His Lordship read the contract of the 20th November, 1874, set out above, and continued :—]

Now, it is said that it is a question of fact to be tried, whether that acceptance was taken in satisfaction. It is one of the most ordinary terms of a mercantile bargain for "payment to be made by buyers' acceptance of sellers' drafts at six months' date, against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment." It states that those certificates are to be given, no doubt as a condition, before the vendor is entitled to require the buyer's acceptance. Whoever heard of such a thing in a mercantile contract, when it is said that payment is to be made by buyer's acceptance of seller's drafts, that if the acceptance was dishonoured, the right to sue under the original contract did not revive? No one ever heard that if the purchaser became insolvent before the goods were actually delivered, the vendor's right to refuse delivery to an insolvent purchaser did not revive. Or even if he had actually started the goods, and delivered them to a carrier to be carried to the purchaser, it is perfectly well known that at law upon the buyer's insolvency there would be a right of stoppage *in transitu* which would revest the vendor's lien. It would make no difference that a bill had been given which had not yet become due, or that credit had been given. No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill, and during the time that the bill is current there is no vendor's lien, and the vendor is bound to deliver. But if the bill is dishonoured before delivery has been made, then the vendor's lien revives ; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser.

Then the next point is as to the wharfinger's certificate. It is perfectly plain upon the contract, and on reading the certificate, what the certificate is. It is to be a "wharfinger's certificate of each 500 tons being stacked ready for shipment." The certificate itself is in exact conformity with what one would expect: "I hereby certify that there are lying at the works of *Bolckow*,

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Vaughan, & Co. 500 tons of iron rails, which are ready for shipment, and which have been rolled under contract." It professes simply to be what it is, a certificate that those tons are ready for shipment. It is merely a security to the buyer that such things are actually there. It is not the same thing as the inspector's certificate. The inspector examines the rails while they are being manufactured at the manufactory, and certifies that they are properly made. The wharfinger certifies that those rails have been actually brought down, and are actually ready for shipment. It is utterly impossible, in my opinion, to make that out to be a document of title. A document of title is something which represents the goods, and from which, either immediately or at some future time, the possession of the goods may be obtained. In this way a bill of lading represents the goods while they are at sea, and by which, when the goods arrive at the port of destination, the possession of the goods may be obtained. So also a delivery order is an order for the delivery of the goods either immediately or at some future time; generally immediately on the presentation of the delivery order the party is entitled to the goods. Therefore it represents the goods. It is perfectly plain that the certificate was never intended to represent the goods, and the goods could never have been obtained by it, because by the contract and by the certificate itself the goods were to be shipped for *Cronstadt* and were to be delivered at *Cronstadt;* and I should like to know whether, when the goods were shipped for *Cronstadt*, and a bill of lading was given for the goods, which would represent the goods certified, and supposing the certificate is mortgaged to *A.* and the bill of lading is mortgaged to *B.*, when they arrive at *Cronstadt*, the man who holds the certificate or the man who holds the bill of lading would be entitled to the goods? There can be no doubt the man who would hold the bill of lading would be entitled to the goods, because that is a real document of title which represents them. Then it is said that there is a custom of the trade to treat these certificates as warrants. Now, in the first place, there is no evidence of such a custom. That these certificates are often pledged, and that as between the party who pledges them and the party who advances money they would be evidence of an equitable charge, is, I think, very probable. The

iron trade, we know, is a very speculative trade. I daresay those who are engaged in it raise money in that way. But if the custom were proved, I cannot understand how any practice of raising money in that way can affect the vendor's rights. The vendor, having agreed by his contract that he would give the wharfinger's certificate in order that the purchaser may have evidence that the goods have been actually made, and now are actually ready to be shipped, cannot help giving the certificate; and how the fact of his giving that certificate, which does not profess to be negotiable, and does not profess to require the delivery of the goods to order or to bearer, or anything of the kind, can affect his lien as vendor, merely because the purchaser chooses to borrow money on the faith of it, I am at a loss to conceive.

Therefore it appears to me that neither of those two grounds is made out at all. The case is the simple ordinary case of a vendor who has sold goods upon credit, and before the time has arrived for the delivery of them the purchaser has become insolvent, and has given notice to all the world and to his creditors that he is insolvent. The vendor cannot rescind the contract, according to the late decisions, but he is entitled to say, I will not deliver the goods until I get actual payment.

The only other question that was raised was this: Mr. *Kay* said that *Bolckow, Vaughan, & Co.* had negotiated the bills. I do not think myself that that would make any difference, because they have no security on those bills; there is no third person or party to the bills; they are simply bills drawn by *Bolckow, Vaughan, & Co.* on the *Aberdare Iron Company*, and they have no security for the payment of the bills except the *Aberdare Iron Company*. *Bolckow, Vaughan, & Co.* may have to take up those bills. Two of them have become due, and although we have no evidence one way or the other as to their being indorsed, or what has happened, we may suppose that as *Bolckow, Vaughan, & Co.* are in good credit, that they have taken up the two bills which are due. Even if the law was that a lien could not be enforced during the time the bills were outstanding, yet all the other bills, looking at the dates, will become due, and will have to be taken up before the goods can be sent to *Cronstadt*. There is therefore no reason that I can see for interfering with the carrying out of the

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contract. If the purchaser or the mortgagees think it is a beneficial contract, and are willing to pay the full price for the goods, of course when the goods arrive at *Cronstadt,* and the full amount of the bills is paid, *Bolckow, Vaughan, & Co.* will be bound to deliver the goods; but in my opinion, they are not bound to deliver the goods otherwise. I quite agree that, under all the circumstances, the Court ought not to grant an injunction so as to interfere with their rights. It seems to me that it would be a very serious thing indeed to do so. Here is a large sum, upwards of £32,000, which, according to the ordinary course of business, and the bargain they have made, they will receive between the 21st of June and the 27th of August, and which they will have to pay to the holders of these bills; and to deprive them of the right of realizing that sum out of this iron until the whole of this case has been decided seems to me to be taking away from a mercantile firm a very large sum of money indeed, which would be of very great consequence to them. I think it ought not to be done unless a clear *primâ facie* case is made out, and the Court can see clearly that there is some question of difficulty to be tried at the hearing. In my opinion this case only turns upon matters of law, on which I do not entertain myself any serious doubt. I think the application to the Vice-Chancellor ought to have been refused with costs.

Solicitors for the Appellants: Messrs. *Ashurst, Morris, & Co.*
Solicitor for the Plaintiff: Mr. *C. W. Dommett.*
Solicitors for the other Respondents: Messrs. *Hollams, Son, & Coward;* Messrs. *Green, Allin, & Greenop.*

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L. JJ.
1875
June 29.

[1875 J. 86.]

Bankers—Agents—Bills—Appropriation.

Customers of country bankers paid in to the bankers a sum of money in bank notes and also some bills of exchange to be remitted to *London* in order to meet certain acceptances. The bankers sent to their *London* agents the bills and some bank notes, with a letter directing them to pay a certain sum of money, also giving them notice of the acceptances as payable at their bank, and giving directions as to other business. The country bankers stopped payment, owing a large balance to the *London* bankers:—

Held that, as between the country customers and the *London* bankers there was no appropriation of the bills and notes to meet the acceptances, and that the *London* bankers could retain the bills and notes without meeting the acceptances.

Decree of *Malins*, V.C., affirmed.

THE Plaintiffs in this case were silk merchants at *Southwell*, where *Wylde & Co.* were their bankers, and the Plaintiffs usually made their acceptances payable at the bank of *Robarts & Co.*, the *London* agents of *Wylde & Co.*

On the 11th of December, 1874, the Plaintiffs paid in to their account with *Wylde & Co.* £900 in notes and eight bills of exchange payable in March and April following for £1522 8*s.*, total £2422 8*s.* These were paid in as the Plaintiffs alleged, and as appeared to be the case, for the express purpose of meeting acceptances of the Plaintiffs for £2230 6*s.* payable on the following day at the bank of *Robarts & Co.*, and specific instructions were accordingly given by the Plaintiffs to *Wylde & Co.*

On the same day *Wylde & Co.* sent up to *Robarts & Co.* the bills for £1522 8*s.* and £500 in notes. With the bills and notes they sent a letter on a printed form as follows:—"To Messrs. *Robarts, Lubbock, & Co.* Gentlemen,—Be pleased to make the undermentioned payments, &c., at the debit of Messrs. *Wylde & Co.*" A schedule to the letter, in the form of a debtor and creditor account, was annexed, having on one side "We debit you," and specifying the bills for £1522 8*s.*, the notes for £500, and two other small cheques (total £2121 10*s.*), as remitted; and on the other side,

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"We credit you," under which was a sum of £849 10*s.*; and it was stated that this was a direction to pay that sum. Under the head "Advice of drafts" were described the acceptances of *Johnson & Co.* for £2230 6*s.* And the letter contained directions to *Robarts & Co.* as to an investment in consols. *Robarts & Co.* sent a formal answer, acknowledging the receipt.

On the 12th of December the acceptances were left with Messrs. *Robarts & Co.* for examination, but were returned by them with the words indorsed, "Awaiting confirmation of advice." On the 14th of December *Wylde & Co.* stopped payment. Notice of this was telegraphed to *Robarts & Co.*, who then refused to pay the amounts due on the acceptances. They, however, retained the bills and notes, as having been simply remitted to them in the ordinary course, and without any reference to the acceptances.

The Plaintiffs thereupon filed the bill in this suit praying a declaration that *Robarts & Co.* were trustees for the Plaintiffs of the bills and notes remitted to them for the purpose of meeting the acceptances, and might be ordered to return them to the Plaintiffs, and in the meantime might be restrained from negotiating the bills.

One of the partners in the bank of *Robarts & Co.* deposed that they never knew or heard of the alleged appropriation of the bills, and knew nothing of any such arrangement between the Plaintiffs and *Wylde & Co.* That the bills and notes were sent to them in the manner usual between a *London* banker and his country correspondent, and that *Wylde & Co.* always notified their remittances in the same way. That when they received such bills they sometimes discounted them, crediting *Wylde & Co.* with the proceeds, and sometimes, as in this case, held them as short bills to the account of *Wylde & Co.* As to the bank notes, *Robarts & Co.* did not know where they came from; nor did *Robarts & Co.* know the state of the affairs of *Wylde & Co.*; but as they had made considerable advances to *Wylde & Co.*, they were unwilling to increase the amount, and had not funds in hand to meet the acceptances. On the 14th of December, when *Wylde & Co.* stopped payment, the debit balance of their account with *Robarts & Co.* was £10,540.

The Plaintiffs moved for an injunction; and the motion was turned into a motion for a decree, on the hearing of which the

Vice-Chancellor *Malins* dismissed the bill with costs, expressing his opinion that the case was entirely covered by *Bolton* v. *Puller* (1).

The Plaintiffs appealed.

Mr. *Glasse*, Q.C., and Mr. *Phear*, for the Appellants:—

It was the duty of *Robarts & Co.* to return the bills if they did not mean to meet the acceptances. They could not act on that part of the letter which was to their benefit, and refuse to act on the rest. Moreover, as between the Plaintiffs and *Wylde & Co.* there was a distinct appropriation, and *Robarts & Co.*, as agents of *Wylde & Co.*, must take the bills on the same terms. The bills were sent to *Robarts & Co.* on condition only, and they cannot keep the bills and refuse to comply with the conditions. If *Robarts & Co.* had asked *Wylde & Co.* what was meant, they would have been told, and it was their duty to ascertain on what terms the bills were sent to them. They cannot avail themselves of their own neglect.

Mr. *Higgins*, Q.C., Mr. *Whitehorne*, and Mr. *C. H. Robarts*, for Messrs. *Robarts & Co.*, were not called upon.

Mr. *W. C. Renshaw* for the trustee of *Wylde & Co.*

SIR W. M. JAMES, L.J.:—

I am of opinion that the decree of the Vice-Chancellor *Malins* in this case is perfectly right. Looking at the evidence of the bankers, and according to my notion of banking business, it would be utterly impossible for a *London* banker to transact his business as an agent for another firm if such a bill could be sustained. There was no privity of any kind between the Plaintiffs and the *London* bankers. The Plaintiffs made some arrangement with *Wylde & Co.* by which, giving them partly money and partly bills, there being acceptances that were not due, they induced *Wylde & Co.* to undertake to advise *Robarts & Co.* to meet the acceptances; but that was merely between them and *Wylde & Co.* *Wylde & Co.* did not send up the £900, which was part of what they received from the Plaintiffs, but they did send some notes,

(1) 1 B. & P. 539.

(0 See WN 1875 96

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whether part of that £900 does not appear, and they sent the drafts in question, as against which they put £849 10*s.* They said, "We debit you with so much, and we credit you with so much;" which was an appropriation of the £1522 8*s.* and the £500, as against the £849 10*s.* That was an absolutely closed account, leaving only the difference between the £849 10*s.* and the £2121 10*s.* on the other side. Then the *London* bankers are asked in the same letter to pay these drafts, and to make an investment in consols. It seems to me absurd to contend that there was an appropriation in this way, as between the country bankers and the *London* bankers. Very likely the understanding might have been that the business would go on according to their directions, not by reason of any specific appropriation, but on the understanding that the same credit would be given as was given before, and as part of the same arrangement. That is quite consistent with the usual course of their business; but when the insolvency came and altered the state of matters, the credit could no longer be given, and the tree must be taken as it fell. Those drafts were in the hands of *Robarts & Co.* apparently appropriated to the payment of the £849 10*s.*, and not expressly appropriated to anything else, but merely as part of the general account. I think, therefore, that the decree of the Vice-Chancellor is quite right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is admitted that there was a specific appropriation of the bills to the amount of £1522 8*s.* as between the Plaintiffs and *Wylde & Co.* towards payment of the acceptances; that is to say, that *Wylde & Co.* were to procure *Robarts & Co.* to advance the money for the acceptances, and the bills were to be a security to *Wylde & Co.* for the repayment of the sum. There is, unquestionably, not the slightest evidence that *Robarts & Co.* had any notice that *Wylde & Co.* had received the bills for any such purpose. There is no case against them on that ground. The only case as put to us is that the property in the £1522 8*s.* bills never passed to *Robarts & Co.*, because they did not pay the acceptances. According to that argument, if they took

the money they must have made the whole of the payments and the investment, notwithstanding *Wylde & Co.* became insolvent.

In my opinion there is nothing in the relation between the country bankers and the *London* bankers to justify any such assumption. The beginning of *Wylde & Co.'s* letter merely states the account with the bank. The country bankers write as usual to the *London* banker stating the transactions of the day, and they begin by stating "We debit your bank with certain sums of money which are enclosed in the letter." It is the same as saying, we remit these sums to be placed to our credit in your account, and we credit you with £849 10*s*. That is merely sending them a statement of what was the account of their transactions, and they advise certain drafts to be paid and certain investments to be made, and so on. That was simply asking *Robarts & Co.*, to whom they were already largely indebted, to incur a farther debt by making further advances; and probably *Robarts & Co.*, in the ordinary course of dealing of a *London* banker with the country banker for whom he is agent, would have made those advances. It has been pressed that the banker was obliged to increase the debt by making those advances, but there is no ground for that contention.

I am of opinion, therefore, that the decree of the Vice-Chancellor was quite right, and the appeal must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *J. & F. Needham*, agents for Mr. *A. Cann*, of *Nottingham*.

Solicitors for the Defendants: Messrs. *Reyroux & Co.*

L. JJ.
1875
July 15.

Ex parte COOPER. *In re* ZUCCO.

Liquidation by Arrangement—Fraudulent Preference—Application by a Creditor to use the Name of the Trustee.

2 Ch D 494

Where the result of recovering property alleged to have been delivered to a creditor by way of fraudulent preference would not be for the benefit of the creditors at large, but of an individual creditor who claims a security on it, the trustee ought not to take proceedings for the recovery of the property himself, nor will the individual creditor be allowed to take them in his name.

THIS was an appeal from an order of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

On the 25th March, 1875, Messrs. *Zucco & Kessissoglu*, merchants in *London*, presented a petition for liquidation by arrangement, and on the 19th of April the creditors agreed to a liquidation, and appointed a trustee and committee of inspection. The debtors had subsequently obtained their discharge.

On the 18th of December, 1874, previously to the commencement of the liquidation, Mr. *Zucco* applied to Mr. *E. Webb* for an advance of £2000, on the security, as *Webb* alleged, of a consignment of currants, which were then in course of shipment at *Catacola*. *Webb* accordingly accepted bills for £2000 in favour of the debtors' firm, which he had since paid.

On the arrival of the bills of lading for the currants, *Zucco* pledged them to Mr. *J. Balli*, as a security for advances by him. This took place on the 22nd of February, 1875, and *Webb* alleged that the security was given under circumstances which amounted to undue preference of *Balli*. The estimated value of the currants was about £1500. *Webb* accordingly applied to the Registrar for an order that the trustee in the liquidation should account to the estate for the value of the currants, or should take the necessary steps for recovering them from *Balli*, and that the applicant might be declared entitled to a security on the goods for £2000.

The Registrar refused the application with costs, but made an order that *Webb* should be at liberty to use the name of the trustee in any proceedings he might be advised to take, either

against *J. Balli* or the debtors, to enforce delivery of the currants or the payment of the proceeds thereof to him, upon giving the trustee an indemnity against costs. The trustee appealed from this part of the order.

Mr. *Winslow*, Q.C., and Mr. *Hollams*, for the Appellant:—

The Registrar ought not to have given leave to *Webb* to sue in the name of the trustee. If he should succeed in recovering the currants from *Balli*, it will be entirely for his own benefit, and not for the benefit of the creditors, as he claims a lien to a larger amount than their value.

If the creditor really has a lien on the currants, he can enforce his claim against *Balli* in a Court of Equity.

Mr. *Lanyon*, for *Webb*:—

The fact that we have a remedy in equity is no reason why we should not be allowed to dispute the claim of *Balli* in bankruptcy on the ground of fraudulent preference.

[SIR W. M. JAMES, L.J.:—How can there be fraudulent preference by delivery of goods that do not belong to the bankrupt? You say that the goods were not the bankrupt's, but yours.

SIR G. MELLISH, L.J.:—The doctrine of fraudulent preference is entirely for the purpose of distribution among the creditors generally; not for the benefit of any single creditor.]

We wish to recover the goods for the estate; we shall then claim our lien upon them, and if we fail in that, we shall share with the other creditors an increased dividend. We therefore wish to make the application at our own risk. The Registrar had jurisdiction to make the order under sect. 20 of the *Bankruptcy Act*, 1869, and Rule 78 of the *Bankruptcy Rules*, 1870.

SIR W. M. JAMES, L.J.:—

Probably the Registrar thought that it might do some good to permit *Webb* to use the trustee's name, and could not do any harm if he made the application at his own risk. But I think the trustee's name ought not to be used by an incumbrancer unless he is willing to give up his claim on the property recovered for the benefit of all the creditors.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. I think the trustee ought not to make an application himself or to allow an application to be made in his name to recover property alleged to have been given to a creditor by way of fraudulent preference, except for the benefit of all the creditors. He ought not to do so simply for the purpose of benefiting a single creditor. The order, so far as it permits the name of the trustee to be used, must be discharged.

Solicitors: Messrs. *Hollams, Son, & Coward;* Messrs. *Stibbard & Cronshey.*

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Ex parte BARRELL. *In re* PARNELL.

Vendor and Purchaser—Deposit, Forfeiture of—Disclaimer of Purchase by Trustee in Bankruptcy—Bankruptcy Act, 1869, *ss.* 23, 24—*Vendor entitled to Deposit.*

1 QBD. 719.

Where a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit.

By a contract for sale of real estate it was stipulated that a portion of the purchase-money should be paid immediately, and the residue on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt, and the trustee disclaimed the contract under the 23rd section of the *Bankruptcy Act*, 1869, and called upon the vendor to repay the deposit:—

Held, that the vendor was entitled to retain the deposit.

THIS was an appeal from an order of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy, made in the bankruptcy of *George Thomas Parnell.*

By an agreement in writing made on the 7th of January, 1874, and signed by both parties, *Richard Barrell* agreed to sell to *George Thomas Parnell* certain freehold and copyhold hereditaments at *East Bergholt*, in the county of *Suffolk*, for £3000, of which the sum of £300 was to be paid as a deposit immediately after the signing of the agreement, and the residue thereof on the completion of the purchase; and it was agreed that the purchaser should take the fixtures at a valuation. It was also stipulated that the

purchase should be completed on the 24th of June, 1874, and that if from any cause whatever the purchase should not be completed on that day, the purchaser should pay to the vendor interest on the residue of the purchase-money, and on the valuation of the fixtures, after the rate of £5 per cent. from that day till the completion of the purchase.

The agreement also contained provisions for the delivery of the abstract of title, and for sending in objections; but it contained no stipulation as to the forfeiture of the deposit in case of the contract failing through the default of the purchaser.

The deposit of £300 was paid to *Barrell* in pursuance of the contract, and an abstract of title was sent to the solicitors of the purchaser within the appointed time, and the title was eventually accepted by the purchaser and the draft conveyance prepared. As, however, the purchaser delayed the completion of the purchase, the vendor, on the 25th of March, 1875, filed a bill against him to enforce specific performance.

On the 2nd of April, 1875, *Parnell* was adjudicated a bankrupt, and by a letter dated the 11th of June, 1875, the trustee, in reply to a notice sent to him by *Barrell* under the 24th section of the *Bankruptcy Act*, 1869, formally disclaimed the contract of the 7th of January, 1874, and required the repayment of the deposit of £300. *Barrell* having refused to repay the deposit, the trustee applied to the Court to order the repayment, and the Registrar made an order that *Barrell* should pay the sum of £300 into Court to abide the result of any application for damages which might be made by him.

From this order *Barrell* appealed.

Mr. *Robinson*, Q.C., Mr. *Julian Robins*, and Mr. *Leeke*, for the Appellant, were stopped by the Court.

Mr. *E. Cooper Willis*, for the trustee:—

Where there is no clause in the contract providing for the forfeiture of the deposit, the purchaser is entitled to recover it. The deposit is only paid to the vendor as a guarantee that he shall suffer no loss if the contract goes off; and the Registrar has pro-

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vided for this in his order. The authorities on the subject are not very clear, but they are on the whole on our side: *Casson* v. *Roberts* (1); *Palmer* v. *Temple* (2); *Ockenden* v. *Henly* (3); *Sugden's* Vendors and Purchasers (4). The only case in favour of the Appellant is *Depree* v. *Bedborough* (5), which turned upon the special circumstances.

SIR W. M. JAMES, L.J.:—

The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, Give me back the deposit. There is no ground for such a claim. The order of the Registrar must be discharged.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears to me clear that, even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default.

Solicitors: Messrs. *Farmer & Robins;* Messrs. *Poole & Hughes.*

(1) 31 Beav. 613.
(2) 9 A. & E. 508.
(3) 27 L. J. (Q.B.) 361.
(4) 14th Ed. p. 40.
(5) 4 Giff. 479.

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[1872 P. 6.]

Rescinding Contract—Fraud—Agent—Engineer—Certificate.

A telegraph works company agreed with a telegraph cable company to lay a cable, the cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the works company when they received the instalments from the cable company:—

Held, that, under the circumstances, the agreement between the engineer and the works company was a fraud, which entitled the cable company to have their contract rescinded, and to receive back the money which they had paid under that contract.

Per James, L.J.:—Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first-named principal to have the contract rescinded, and to refuse to proceed with it in any shape.

Per Mellish, L.J.:—As the works company had by their fraudulent conduct prevented the cable company from having the full benefit of the contract, the cable company were entitled to have the contract rescinded.

Decree of *Malins*, V.C., affirmed.

EARLY in the year 1869 *Don M. F. P. Soldan*, a native of *Peru*, obtained from the Peruvian Government the promise of a concession for the laying of a submarine telegraph cable from *Tumbez*, in *Peru*, to *Panama*, where it would be in connection with a proposed cable between the Isthmus of *Panama* and *Santiago de Cuba* by a cable to be laid by a company called the *West India and Panama Telegraph Company*, which was promoted by the *India Rubber, Gutta Percha, and Telegraph Works Company*. This cable again would be in connection with *Havana* by a cable between *Santiago de Cuba* and *Havana*, to be laid by the *Cuba Submarine Telegraph Company*. *Don M. F. P. Soldan* entered into communication with the *India Rubber, Gutta Percha, and Telegraph Works*

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Company as to the terms on which they would lay the *Peru and Panama* cable, and on the 9th of November, 1869, he obtained the concession. A company, to be called the *Panama and South Pacific Telegraph Company*, was then projected for making and laying this cable. At the meetings of the provisional directors of that company Sir *C. T. Bright* was usually present, and in the prospectus of the company he was named as engineer thereof. On the 12th of January, 1870, the *Panama and South Pacific Telegraph Company* (hereinafter called the *Panama Company*) was registered, three of the persons who signed the memorandum of association being directors of the *Telegraph Works Company*. By an agreement of the same date *Don C. P. Soldan* (to whom *Don M. F. P. Soldan* had assigned his interest) agreed to transfer the concession to the *Panama Company*. By another agreement, also of the 12th of January, 1870, and made between the *Telegraph Works Company* and a trustee for the *Panama Company*, the *Telegraph Works Company* agreed, on payment of £40,000, to commence to make, and continue to make, a series of submarine cables, to be submerged between a point to be agreed upon in *Central America* and *Tumbez*, in *Peru*, touching at intermediate stations. The cables were to be laid within ten months, and were to be paid for as follows:—

On the order being given		£40,000
In twelve instalments of fifteen thousand pounds upon certificates from the company's engineer that the manufacture of the cables is making sufficient progress to entitle the contractors thereto .		180,000
On shipment		30,000
On the cables being completely laid and certified by the company's engineer—		
In cash .	£25,000	
In shares .	25,000	
		50,000
		£300,000

The *Panama Company* agreed that their engineer should duly give the certificates upon reasonable evidence of the facts to be

certified being offered by the contractors; and provisions were made for enabling the engineer to inspect and test the cable; and it was agreed that Sir *C. T. Bright* should be the engineer to the *Panama Company* for the purposes of this contract. A schedule to the agreement contained a specification of the weight, substance, and formation of the cable.

On the 13th of January, 1870, the secretary of the *Panama Company* wrote to ask on what terms Sir *C. T. Bright* would execute the work of engineer to the company; and on the following day Sir *C. T. Bright* answered that his charge would be 1½ per cent., to be paid monthly as the disbursements were made. At a meeting held on the 25th of January these terms were accepted. On the 4th of February, 1870, the directors of the *Panama Company* gave an order to begin making the cable, and gave cheques for £40,000 to the *Telegraph Works Company*, and for £600 to Sir *C. T. Bright* as his commission on the £40,000.

On the 8th of February, 1870, Sir *C. T. Bright*, being about to leave *England* in order to lay the *West India and Panama* cable, sent a letter to the *Telegraph Works Company* stating the terms on which he would undertake the laying of the *Cuba* cable for the *Telegraph Works Company*. The letter then went on:—

"As regards the *Panama and South Pacific* cables, I should be willing to lay them under the same conditions as your contract with the *Panama and South Pacific Company*, and of my arrangement for laying the *West India and Panama* cables, for the sum of £80,000, the payments to be made as follows:—£5000 upon the receipt by your company of the 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th instalments of £15,000 each, payable by the *Panama and South Pacific Company* under the contract, and £15,000 upon the shipment of the cables, making a total of £55,000. The balance of £25,000 to be paid to me in cash or fully paid-up shares of the *Panama and South Pacific Company*, at your company's option, upon the receipt by your company of the payment under the contract due when the cables are completely laid. Any extensions in the *Pacific* which can be sent out with the same expedition to be upon proportionate terms to the length of cable."

On the 18th of February the secretary of the *Telegraph Works*

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Company wrote to Sir *C. T. Bright* that his offer had been accepted.

According to the terms of the concession, £60,000 of the *Panama Company's* capital was to be subscribed for in *Peru;* this, however, was not done; and thereupon, as the *Panama Company* alleged, the *Telegraph Works Company* were told not to go on with the cable, and on the 3rd of August, 1870, a formal resolution to that effect was made by the directors of the *Panama Company*, and was communicated to the *Telegraph Works Company*. On the 16th of November, 1870, the *Telegraph Works Company* claimed £90,000 as a further payment, but the *Panama Company* refused to recognise their liability. No further money was subscribed in *Peru*, and a petition for winding up the *Panama Company* was presented. Certain modifications in the contract were then proposed, and the petition was withdrawn. In the month of September, 1871, Sir *C. T. Bright* resigned his position as engineer of the *Panama Company*, and soon afterwards the directors of that company, or such of them as were not also directors of the *Telegraph Works Company*, discovered, as the bill alleged, that Sir *C. T. Bright* had the sub-contract with the *Telegraph Works Company;* and, after some correspondence, in January, 1872, the original bill in this suit was filed by the *Panama Company* against the *Telegraph Works Company*, *Matthew Gray*, the manager of that company, Sir *C. T. Bright*, *Don Carlos Pas Soldan*, and *J. S. Leigh*, who had been engaged with *Soldan*.

The bill was afterwards amended, and, as amended, stated as above stated, and that the directors of the *Panama Company* entered into the contract with the *Telegraph Works Company* under the advice of Sir *C. T. Bright* that it was a proper contract; but they had recently been advised that the contract did not make proper provisions for laying the cable, and was defective, and they charged that Sir *C. T. Bright* ought to have pointed out these defects. The *Panama Company* further charged that, even if no formal sub-contract was executed by Sir *C. T. Bright* until after the contract between the companies, still the sub-contract must have been contemplated by him before the execution of the contract of the 12th of January, 1870, but the existence of any such sub-contract or understanding was carefully concealed from the only independent

directors of the *Panama Company;* and neither the solicitors nor the directors of that company, except possibly such of them as were directors of the *Telegraph Works Company*, were aware of the sub-contract. And the bill prayed a declaration that the agreement of the 12th of January was not binding on the Plaintiffs, and might be set aside, and delivered up to be cancelled; that the *Telegraph Works Company* might be decreed to repay to the Plaintiffs the £40,000; and that Sir *C. T. Bright* might be decreed to repay the £600 commission.

The *Telegraph Works Company*, by their answer, denied that the directors of the *Panama Company* entered into the contract of the 12th of January, 1870, under the advice of Sir *C. T. Bright*, and denied that the specification was not sufficient. They also denied that Sir *C. T. Bright* was then about to enter into the sub-contract, and alleged that previous to the letter of the 8th of February there was no agreement or understanding on the subject, and that his letter was only a tender by him. They denied that there was any concealment of the sub-contract; and said that the fact of Sir *C. T. Bright* being employed by them to lay the other cables was enough to put the *Panama Company* upon inquiry as to the laying of their own cable. They said that it was clearly for the interest of the *Panama Company* to have the work undertaken by an engineer thoroughly experienced like Sir *C. T. Bright.* They also pleaded that the Plaintiffs were barred by acquiescence.

A great quantity of evidence, documentary and otherwise, was adduced, and several persons were examined *vivâ voce* on the hearing before the Vice-Chancellor *Malins.* One of the witnesses, a former secretary of the *Telegraph Works Company*, stated that on the occasion of a similar sub-contract with respect to the *West India* cable, he had told the chairman of the company that such a sub-contract would be illegal. The evidence is further mentioned in the judgment of Lord Justice *Mellish.*

The Vice-Chancellor *Malins* made a decree that, under the circumstances in the Plaintiffs' bill appearing, the agreement of the 12th of January, 1870, was invalid, and not binding upon the Plaintiffs; and that the same ought to be set aside and delivered up to be cancelled; and ordered repayment of the £40,000

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and £600, and ordered the Defendants to pay the costs of the suit (1).

(1) 1875. March 13.

SIR R. MALINS, V.C., after stating the facts of the case, and stating and commenting on the evidence, said that affidavits had been made that there was no concealment or intention of concealment on the part of the Defendants. But on such a subject as this there should not only have been an absence of concealment, but full and complete disclosure and information. The counsel for the Defendants admitted that it would have been better if the Plaintiffs had been told of the sub-contract, but His Honour considered that upon every principle of justice and fair dealing it was absolutely necessary that they should have been told. It might be assumed that if the Plaintiffs had been told of the proposed sub-contract they would not have objected to it, and would gladly have adopted it, as was suggested. But that did not in the slightest degree tend to relieve the Defendants from the consequences of not having made the disclosure, and of not giving to the Plaintiffs the option of saying whether they would or would not acquiesce in their engineer being placed in an anomalous and dangerous position in which his interest would necessarily conflict with his duty.

Several authorities were cited upon that subject, and they were all distinct in shewing that the obligation of full disclosure was imposed upon the Defendants. In the case of *Randall* v. *Errington* (10 Ves. 423), which was one of setting aside a purchase by trustees of trust property, Sir *William Grant* said: "Acquiescence may have the same effect as original agreement, and may bar such a remedy as this. But the question as to acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew his trustee had become the purchaser, for while the *cestui que trust* continued ignorant of that fact there was no laches in not quarrelling with the sale upon that special ground."

The case of *Central Railway Company of Venezuela* v. *Kisch* (Law Rep. 2 H. L. 99) was a case of a misrepresentation in a prospectus, upon the faith of which the Plaintiff *Kisch* had taken shares. In that case, Lord *Chelmsford*, in affirming the decision of the Lords Justices, said: "But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract"—and no doubt his Lordship would not have hesitated to say, "enter into or continue a contract"—"it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'"

The case of *Imperial Mercantile Credit Association* v. *Coleman* (Law Rep. 6 H. L. 189) was a remarkable instance of the obligation of full disclosure. That case came before His Honour, who made a decree against Mr. *Coleman* with costs; and although Lord *Hatherley* reversed that decree, his decision was afterwards reversed in the House of Lords, and His Honour's decree was affirmed. Everything, however, which His Honour said upon the

The *Telegraph Works Company* appealed.

Mr. *Cotton*, Q.C., and Mr. *Lindley*, Q.C. (Mr. *Graham Hastings* with them), for the Appellants:—

It was argued on the hearing before the Vice-Chancellor that subject was agreed to by Lord *Hatherley*, because Lord *Hatherley* did not differ from him as to the principle, but only thought that the clause in question in that case enabled Mr. *Coleman* to enter into the contract without making more disclosure than he had done. Lord *Cairns*, in delivering judgment in the House of Lords, said that a director must comply in the letter and in the spirit of the clause, and that though Mr. *Coleman*, as a director, did state that he had an interest, yet, as he did not state what that interest was, he must repay what he had received.

The case of *Dunne* v. *English* (Law Rep. 18 Eq. 524) illustrated the same principle—a most valuable principle—and always acted upon by this Court, namely, that there should be no concealment, no contrivance by which one man was to be deprived of his right against another. His Honour then stated the facts of that case, and said that the Master of the Rolls there laid down the law to be—"It is not enough to say that the directors were sufficiently informed to be put upon inquiry. They ought, in such a case, to have the fullest information given to them, and ought not to be driven to inquiry;" and came to the conclusion, therefore, that, inasmuch as the Defendant had not disclosed to the Plaintiff the nature of his interest, the whole thing must be set aside, and the Defendant must repay the whole amount. His Honour entirely acquiesced in the judgment of the Master of the Rolls; and though that case was appealed, and the appeal withdrawn by arrangement, His Honour had not the slightest ground for supposing that the decision would have been reversed by any tribunal whatever. The case of *Rawlins* v. *Wickham* (3 De G. & J. 304) was very remarkable, and shewed that every person making a representation, upon the faith of which another dealt, was answerable for the misrepresentation if it turned out not to be true, although he was not guilty of any intentional fraud and himself believed the representation to be true; and it was no laches on the part of the person deceived not making inquiry until he had reason to believe that he had been deceived. That was entirely applicable to this case. There was no laches on the part of the Plaintiffs in not making inquiry whether Sir *Charles Bright* had such a contract, because it was so improbable that any man would enter into such a contract, and they were entitled to believe that he was acting fairly by his employers until the contrary was shewn.

In the case of *Lindsay Petroleum Company* v. *Hurd* (Law Rep. 5 P. C. 221), the vendors of property combined together to make a representation which was not true, and which led to the Defendants entering into a contract to purchase the property, the contract was set aside, and the parties to those false representations were made to pay all the costs.

His Honour had already stated his reasons for coming to the conclusion that there must have been, at least, the expectation of a contract for laying the cable when the contract between these two companies became binding upon the parties on the 4th of February, 1870. Being of that opinion, the

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there was actual, and not merely equitable, fraud on the part of Sir *C. Bright*, but it is clear that there was none, and that there was no question whether the fraud, or unfair dealing, which would avoid that contract, must exist when the contract was entered into, or the contract could be avoided by that which occurred afterwards, did not necessarily arise. But, as that point might be very material if his conclusion as to the expectation of the contract at the time should be erroneous, His Honour thought it right to express his opinion upon the point. Upon principle he could not entertain any doubt that a contract might be just as well avoided by the fraudulent conduct of the parties to it in executing it as if the fraud had existed at the time when the contract was entered into, and, in fact, led to the contract itself. The only authority to the contrary which was cited was the *dictum* of Vice-Chancellor *Wood* in the case of *Onions* v. *Cohen* (2 H. & M. 361). It was only a passage in the judgment, and not necessary for the decision of the case before him; the Vice-Chancellor said: "Except *Gwillim* v. *Stone* (14 Ves. 128), there is no instance of a contract being delivered up to be cancelled, unless there was fraud in obtaining the contract itself." From the respect which His Honour entertained for the decisions of Vice-Chancellor *Wood*, now Lord *Hatherley*, if he had formally decided the point in a case anything like this, His Honour would have very much hesitated in coming to a contrary conclusion. But it was unnecessary for the purpose of the case which he had to decide to do so; and His Honour could not, contrary to the current of authorities, come to the conclusion that because Vice-Chancellor *Wood* there used that *obiter dictum*, those principles, which appear to be perfectly sound, were not to govern the Court. It was admitted on all hands that if there was fraud in inducing a contract, that contract was void, and if there was fraud in the execution of the contract, His Honour's opinion was equally clear that that would avoid the contract from the time when the fraud was discovered. Suppose, as suggested in the course of the argument, that *A.* agreed to sell an estate to *B.* at a price to be named by *C.*, and *A.* afterwards gave *C.* a bribe to name a higher price than he would otherwise have done; could any one doubt that such a contract would be avoided and cancelled by this Court? and yet there was no fraud at the time of entering into the contract —the thing occurred afterwards; or, in the case of *A.* entering into a contract with *B.* to supply him with certain articles to be approved of by his servant or agent; if *B.* bribed the servant to accept inferior articles, could there be a doubt that this or any other Court would hold such a contract not to be binding after the discovery of the fact? The articles previously delivered must, of course, in such a case be paid for; but His Honour was clearly of opinion that *A.* would be entitled to treat the contract as void from the moment when he discovered the fraud. Or, suppose a railway company to employ an engineer, whose duty it was to see that the railway was properly constructed with good and proper materials, and the company discovered that the engineer had entered into partnership with the contractor, could there be a doubt that the company would be at liberty to dismiss the engineer and to treat the contract with the contractor as void from the time the discovery was made? His Honour considered it clear that any fraudulent or unfair con-

motive for any, as it must have been to his interest to have a good cable laid. At the time when Sir *C. Bright* undertook to become

duct on the part of either of the parties to a contract in the execution of it, would avoid it so far as it was not already performed. *Kemp* v. *Rose* (1 Giff. 258) was a case in which the certificate of the architect as to the price to be paid for altering and improving a church was to be conclusive. The builder afterwards discovered that the architect had entered into an arrangement with the persons who were to pay for the improvement of the church that the expense should not exceed a certain amount; there Vice-Chancellor *Stuart* decided that that put the architect in a position of undue bias, and that the builder ought not to be bound by his certificate, and the contract was avoided.

Kimberley v. *Dick* (Law Rep. 13 Eq. 1) followed the same principle. Those were cases in which the instrument was avoided when the contract was entered into. But *Pawley* v. *Turnbull* (3 Giff. 700) was a case where the contract was avoided by reason of dealings subsequent to the time when it was entered into. That was a remarkable decision, and, as His Honour had ascertained from counsel, it was affirmed on appeal by Lord *Westbury*, though it did not appear to be reported. It was a case entirely contrary to the rule laid down by Vice-Chancellor *Wood*— there was no fraud at the time when the contract was entered into, but there was fraud in the course of its execution; and that fraud was fatal to it. So, in this case, if the cable or any part of it had been delivered, the Plaintiffs must, of course, have paid for it; but the certificate of Sir *Charles Bright* would not have been received as to the amount.

His Honour had carefully considered the evidence as to the omission of a specification as to laying the cable in the contract, and was satisfied from the evidence that such a specification ought to have formed part of the contract. But he was unable to come to the conclusion that its omission by Sir *Charles Bright* arose from the fraudulent motives which were attributed to him by the Plaintiffs.

The circumstance of two persons having been directors of both companies would not affect the question between those two companies, as appeared from the case of *In re Marseilles Extension Railway Company* (Law Rep. 7 Ch. 161).

His Honour might well assume that the charges of fraudulent intention which the Plaintiffs attributed to the Defendants were not well founded, and yet upon general principles he should come to the conclusion that such transactions could not stand. He must apply to them the rules which were applied by Lord *Eldon* to dealings between solicitors and clients, and trustees and *cestuis que trust*, in the case of *Ex parte James* (8 Ves. 337); the words of the judgment in which case could not be too strongly impressed upon all persons having dealings with each other, and upon the mind of every practitioner in these Courts, and every member of the legal profession. Whether it was a contract, or whether it was a purchase — whether it was, as in the present case, a contract which might bias the judgment or might influence the conduct, His Honour said with Lord *Eldon*, that the doctrine of the Court rested upon this general principle— "that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no Court is equal to the

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engineer of the *Panama Company* he had not entered into any engagement with the *Telegraph Works Company*, and it is obvious that nothing which occurs subsequently to a contract can render the contract void. In similar cases, all that the Court has done has been to strike out the provision as to the engineer's certificate being necessary.

No contract has ever been set aside on the ground of subsequent fraud: *Onions* v. *Cohen* (1). *Gwillim* v. *Stone* (2) is clearly wrong: *Sugden's* Vendors and Purchasers (3). In *Kimberley* v. *Dick* (4) the contract was not set aside.

It does not follow that a contract is avoided even if there has been fraud, *Attwood* v. *Small* (5), as the parties may have been able to judge for themselves, and not have been affected by the fraud. The case set up by the bill, that Sir *C. Bright* was the adviser of the Plaintiffs in making the contract, has completely failed.

Mr. *Fry*, Q.C., and Mr. *Davey*, for the Plaintiffs:—

We say that there was fraud *ab initio*, and then the contract may be rescinded, though in some cases it may be performed with compensation: *Cutter* v. *Powell* (6); *Planchè* v. *Colburn* (7); *Palmer* v. *Temple* (8); *Keys* v. *Harwood* (9). But this contract cannot now be performed. Even at common law the contract may be treated as rescinded, and any money paid may be recovered. In

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examination and ascertainment of the truth in much the greater number of cases."

Applying those general principles to the present case, His Honour came to the conclusion that the Plaintiffs would have been entitled to treat this contract as void, and to recover the money paid under it if they had discovered the sub-contract with Sir *Charles Bright* immediately after it had been entered into; and as they had done no act to confirm it since they became aware of it, His Honour was of opinion that they had the same right when they discovered this fact in December, 1871.

There must, therefore, be a declaration in conformity with the prayer of the bill, and a decree for the return of the £40,000 by the company and of the £600 by Sir *Charles Bright*, with interest, and the Plaintiffs must have their costs of the suit.

(1) 2 H. & M. 354. 12 Jur. N.S. 198

(2) 14 Ves. 128. The authenticity of this case has been doubted. The name is not to be found in the Registrar's index of decrees for Trinity Term and Michaelmas Term, 1807.

(3) 14th Ed. 233. 13th Ed. 197.

(4) Law Rep. 13 Eq. 1.

(5) 6 Cl. & F. 232.

(6) 2 Sm. L. C. 1.

(7) 8 Bing. 14.

(8) 9 A. & E. 508.

(9) 2 C. B. 905.

Milner v. *Field* (1) the question was not before the Court. An analogous class of cases is where work has been done on land. There, if fraud is proved, the contract has been rescinded, the landowner paying for what has been done. The rule in equity is the same: *Pawley* v. *Turnbull* (2). The express contract is gone, but something is recovered under a *quantum meruit*. If any other engineer but Sir *C. Bright* is to be employed, it must be under some special contract, which does not exist in this case. The agreement between the two companies is clearly avoided by this fraud, as no man can reap any benefit from his own wrong.

Mr. *Cotton*, in reply:—

It is clear that though Sir *C. Bright* alone is named as the engineer, the Court would supply the deficiency if in any way he became incapacitated. When the work is completed, evidence *aliunde* would be taken, and payments decreed accordingly; and even admitting that there has been fraud, it is only a personal incapacity on the part of Sir *C. Bright*. It cannot be contended that if Sir *C. Bright* died or became lunatic, we should get nothing for our cable when laid. His employment forms no essential part of the contract, and even if his conduct has been improper, this Court does not attempt to punish people for merely improper conduct.

No authority whatever has been cited in support of the Plaintiffs' contention; *Blair* v. *Bromley* (3) was a case of misrepresentation; *Jervis* v. *Berridge* (4) was clear on the point on which it was decided. But we deny that in this case there was any arrangement beforehand. Sir *C. Bright* merely tendered, and his tender might not have been accepted; if so, the contract cannot be set aside as invalid. The only relief which can be obtained is a declaration that Sir *C. Bright's* certificate is unnecessary.

SIR W. M. JAMES, L.J.:—

As far as I am personally concerned, the whole of the long and elaborate argument which has occupied so many days of the time of the Court has been entirely thrown away. From the moment

(1) 5 Ex. 829.
(2) 3 Giff. 70.
(3) 2 Ph. 354.
(4) Law Rep. 8 Ch. 351.

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when I understood what the case was—what was the contract between the two companies, and what was the sub-contract between the one company and the agent for the other company—I have been of opinion, and I am now of opinion, that the right of the Plaintiffs to the relief which they have asked, and which has been given to them, is a matter of course, according to the view of the law which I have learnt as student, practitioner, and Judge for nearly half a century.

4 CLD 383.

According to my view of the law of this Court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.

It is said that there is no authority and no *dictum* to that effect. The clearer a thing is, the more difficult it is to find any express authority or any *dictum* exactly to the point. I doubt whether there could be found any authority or any *dictum* exactly laying down the first of the two propositions which I have mentioned, and which nobody has in the course of the argument ventured to dispute—that is, that any surreptitious dealing between one principal and the agent for the other principal is a fraud on such other principal cognizable in this Court. The other proposition as to the relief may perhaps not be found stated in so many terms in any case or in any *dictum*, but many cases may be suggested which probably will be equally without any authority, either in decision or *dictum*. If a man hired a *vetturino* to take him from one place to another, and found that the *vetturino*, after he had accepted the hiring, had conspired with his servant to rob him on the way, he would be entitled to get rid both of the *vetturino* and the servant. So, if a man sits down in a tavern or *osteria* to play at cards or dice with another man for a stake, and finds that his opponent has provided himself with cogged dice or marked cards, the man would be immediately entitled to leave the table, and would not be obliged to procure proper cards or honest dice. I

am not aware, however, of any express decision on either of the cases I have suggested.

I am of opinion that where anything in the nature of a fraud in the eye of this Court is committed, a man has the right at once to sever the connection; and I cannot bring my mind to doubt, that if you find a case where, in the contemplation of this Court, a principal is conspiring with the servant of the other principal to cheat his master in the execution of a contract, then in common sense, common justice, common honesty, and in this Court, the master is entitled to say, "I will have nothing more to do with the business;" and in this Court a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty.

I might have been content to allow this case, as far as I am concerned, to have been based upon the application of a plain principle of equity which is to be enforced without regard to the particular circumstances of the case—upon the general rule which Lord *Eldon* has laid down in the case of *Ex parte James* (1) referred to by the Vice Chancellor—that is, that you must act on general principles, without regard to the particular facts or the particular conduct or misconduct of the parties in a particular case. You must act upon the general principle from the impossibility which the Court finds itself in of ever ascertaining the real truth of the circumstances of which this case is a wonderfully strong exemplification.

But I cannot content myself with disposing of this case merely on that general principle, and only saying that it is the general principle which has put aside and has crushed this contract. Although the parties may not have thought that they were doing anything wrong, yet, when I put together the two contracts—the contract between the Plaintiff company and the Defendant company, and the contract between the Defendant company and Sir *Charles Bright*, the engineer on the other side, and see that the money to be paid to Sir *Charles Bright* is not money to be paid when he has completed, or is completing, the sub-contract as a reward for work and labour, but is money to be paid out to him time after time, exactly when and as he shall have certified money to have

(1) 8 Ves. 337, 345.

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been due and payable by one company to the other, then I say that this is a contract as to which *res ipsa loquitur*, and of which I am bound to express my strongest disapprobation and reprehension.

I am of opinion that the Vice-Chancellor's judgment was given in accordance with every principle of common sense, common honesty, and common equity, and nothing would have persuaded me to give my voice for the reversal of it. I think, however, that the form of the decree ought to be varied, and that the word "invalid" should be left out.

SIR G. MELLISH, L.J.:—

I am also of opinion that the judgment of the Vice-Chancellor ought to be affirmed.

In the first place, after considering the whole of the evidence, I am of opinion that the Plaintiffs have made out the case stated in their bill. I think it is sufficient to support that case if they make out that on the 12th of January, 1870, when the contract between the two companies was made, Sir *Charles Bright* had a reasonable expectation, founded upon the acts of the Defendants, that he would obtain a profitable sub-contract for the laying of the cable, and that the Defendants had notice that he had that expectation. It is quite obvious that if at the time when the contract was made Sir *Charles Bright* had the expectation that he would get a favourable contract for laying the cable, although he might not be certain that he would get it, it was quite impossible that he could be a proper person to advise the Plaintiffs as to the proper form of their contract with the Defendants, particularly with reference to the actual laying of the cable. It is not necessary to determine whether the scientific men who say that there ought to be particular provisions respecting the laying of the cable, which are not in this contract, are right or not. It is quite sufficient that the laying of the cable was a material part of the contract, with reference to which the Defendants must have known that the Plaintiffs required honest and disinterested advice. Indeed it is difficult to see any position more confidential than the position of a telegraph engineer with a telegraph company, particularly a marine telegraph company. The ordinary directors of such a

company are entirely at the mercy of their engineer as to whether it is desirable to buy a particular concession, what contracts shall be taken for making the cable, and what contracts shall be taken for laying the cable. On all these matters they must entirely depend on the skill and disinterested advice of their engineer. With the Lord Justice, I cannot help expressing my astonishment that gentlemen like Sir *Charles Bright* and the directors of the *Telegraph Works Company* should actually think that this is a mere technical rule of a Court of Equity, and that there is nothing morally wrong in itself, in the man who is engineer of a telegraph company, and who has to certify to them when the money becomes payable by them to a construction company, having behind their backs a sub-contract with that construction company for part of what they had contracted to do for the purposes of the telegraph company.

Now that being, in my opinion, sufficient for them to make out, have they made out, that Sir *Charles Bright* had reasonable expectations arising from the conduct of the Defendants that he would obtain the sub-contract? For that purpose it is necessary to consider the relation between the several parties. Here are three companies, the *West India Company*, the *Cuba Company*, and the *Panama Company*. They were three separate companies, although they were intimately connected with each other, and they were formed for carrying on businesses which had intimate relations with each other, the one in fact requiring to use the cables of the others. Then we find that Sir *Charles Bright* is engineer of all three companies; we find that all three companies have contracts in identically the same words with the necessary alterations with the construction company for making and laying the cables; and we find that Sir *Charles Bright* has also a sub-contract, in identically the same words, for laying all three cables. The *West India Company's* contract was made first, and we find that that contract is in terms similar to the contract in the present case, containing no specification with reference to the laying of the cable; and we find Sir *Charles Bright*, on the 8th of February, tendering for and obtaining from the directors of the *Telegraph Works Company* a contract for laying the *Panama* cable. The contract for that cable, as the Vice-Chancellor properly held, did not come into

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existence until the 4th of February, because until the order for the cable was given they were not really bound, according to the terms of the contract, to lay the cable. Is it possible, from those circumstances, not to draw the strongest possible inference that Sir *Charles Bright* had the intention of making the offer for the sub-contract for laying the cable when the original contract was made? No doubt the Court is bound to see that a case of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the Court is to draw reasonable inferences from their conduct. It appears to me impossible not to draw the strongest possible inferences from their conduct in this case. Sir *Charles Bright* must have had reasonable expectation that he would obtain this sub-contract, and in my opinion the fact of the Defendants having, without objection, given him the contract for laying the *West India* cable, gave him a reasonable ground to suppose that he would also obtain the sub-contract for laying the *Panama* cable. But the case does not rest there. There is evidence that the directors of the *Telegraph Works Company*, at the time when the sub-contract for the *West India* cable was made, clearly had their attention strongly called to the fact that it was an illegal and improper contract. There is, besides, evidence that from communications with Sir *Charles Bright* himself he knew that the times for laying the different cables had been arranged in order that the same persons who laid the *Cuba* cable and the *West India* cable should also be able to lay the *Panama and South Pacific* cable; that the same ship which laid it should be able to go round *Cape Horn* in time to lay the cable on the *Pacific* side; that the same staff which had laid the cable on the *Atlantic* side should go across the Isthmus and lay the cable on the *Pacific* side. I can perfectly well understand that this might be an economical arrangement, and that it would be advantageous, and what would be expected, that the same person should be employed, whoever he was, to lay the different cables.

Now, what evidence is there on the other side, because it is said we are to rely on what is said by Sir *Charles Bright* and Mr. *Gray* and the four directors? It is impossible to place any great reliance on what the four directors say as to what passed in their minds. I do not know whether what passed in their minds is even material,

because if from the fact of the laying of the *West India* cable having been given by them to Sir *Charles Bright*, they ought, as reasonable men, to have assumed that he would necessarily expect also to get a contract for laying the *Panama* cable, that fact, in my opinion, imposed a duty on them before the contract was made for the making and laying the *Panama* cable to have given notice to the other company that Sir *Charles Bright* had got the sub-contract for laying the *West India* cable. Sir *Charles Bright* says he did not intend until a subsequent period to make the application for laying the *Panama* cable, and the directors say they did not think he would apply for it. I do not think the evidence they gave as to what was really passing in their minds ought to overpower the facts which appear to me irresistibly almost to lead to the inference that whether they talked about it or not, from the fact of the laying of the *West India* cable having been given by the Defendants to Sir *Charles Bright* when he was made the engineer of the Plaintiffs, what he understood, and what everybody understood as a matter of course, was, that he would apply for and obtain the sub-contract for laying the *Panama* cable.

Therefore I think that, this being really in substance the case stated by the bill, the Plaintiffs are entitled to the relief they seek; and I am also of opinion that, even if the sub-contract is to be treated as never having been thought of until the time when it was actually made, they would still be entitled to the relief they seek.

I am not quite certain that I go the full length to which the Lord Justice has gone in thinking that because a person has been a party to a fraudulent act of this kind after the contract was made, the mere fact of his having been guilty of such fraudulent conduct, supposing that a full remedy for the fraud could be otherwise obtained, would entitle the other party to say, "Because you acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you." I am not aware of any authority which has gone to that extent. As far as I know, the consequence of fraud is, that the Court will see that the party defrauded obtains, as far as can be given, full redress for the fraud, and I have thought it, therefore, necessary on this part of the case to consider whether the Plaintiffs could be re-

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lieved from the consequences of this fraud by anything short of the relief which the Vice-Chancellor has given to them.

Now I do not think it necessary to give a conclusive opinion whether at law there would be a defence on the ground that by the act of the Defendants the performance of the contract has been rendered impossible. No doubt it is a clear principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract, and, certainly, according to the case of *Planchè* v. *Colburn* (1) and other cases, it appears sufficient if the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different. Still there may be a question of law in a case of this kind as to how far the certificate of the engineer would be considered so much of the essence of the contract that the Plaintiffs, having been deprived of that, would be entitled at law to rescind the contract. But whether it is so or not, I am clearly of opinion that if by any fraudulent misconduct of the Defendants in entering into an agreement with Sir *Charles Bright*, which had the effect of making it impossible to keep him as a disinterested engineer—if by that it is rendered impossible that the Plaintiffs can have the full benefit of the contract, then it appears to me that there is sufficient to entitle them to rescind the contract.

Now, the way in which the question arises in the present case is really this: The contract has been broken, and it seems to be clear on the facts that, independently of the question which is raised before us, it has been broken by the Plaintiffs, and so long a time has elapsed that neither party is bound to the other to complete the contract. The only question, then, is, whether the Defendants ought to keep the £40,000, and besides that, ought to be allowed to sue at law for any damages they may have sustained on the grounds of the Plaintiffs not having completed the contract.

Let us first consider whether the Paintiffs, if they had at an early period discovered the sub-contract with Sir *Charles Bright*, would have been entitled in this Court to say that the contract should be rescinded. My opinion is that they would, because it is impossible to say that the sub-contract does not make a material and

(1) 8 Bing. 14.

essential difference in the performance of the contract. It is the bargain between the parties that Sir *Charles Bright* should be the engineer, and assuming this to mean that Sir *Charles Bright* is to be the engineer as long as he is alive and capable of performing the duties of an engineer—if that qualification is to be put in—still he is alive and is capable of performing them, but the Plaintiffs have been deprived of his services by the act of the Defendants in entering into the sub-contract with him, and I do not see how it is possible that they can have the full benefit of the contract. It may be said that as there is no provision for anybody else being appointed engineer in his stead, it is impossible that the Plaintiffs can have the full benefit of the contract, and therefore upon that ground they would be entitled to rescind it.

But it has been argued that for a year and a half the sub-contract was not discovered, and that the Defendants are to be in a better position because they concealed the fact of this fraudulent contract which they had entered into. In my opinion, so far from that bettering their case, it gives, if possible, an additional reason why the contract should be set aside. It appears that during the whole time when the contract was being executed, and ought to have been executed, and up to the time when the Plaintiffs broke the contract by giving notice to the Defendants not to go on making the cable, the Plaintiffs had an engineer who, without their knowledge, had entered into a contract with the Defendants which prevented him from giving them disinterested advice. How is it possible that this Court, or anybody else, can discover what effect that may have had on the breaking of the contract? How can anybody know that supposing the Defendants, at the time when Sir *Charles Bright* had agreed to take the sub-contract, had honestly revealed to the Plaintiffs that Sir *Charles Bright* had taken the contract, and another person had then been appointed engineer in his stead—how can anybody know whether the contract would ever have been broken?

It seems to me that it would be in the highest degree inequitable to allow the Defendants to keep the £40,000. The contract having been broken, and having come to an end, is it to be treated as having been broken by the default of the Plaintiffs, or by the default of the Defendants? It appears to me clearly that the

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Defendants have deprived the Plaintiffs of the advice of their engineer, and having by improper conduct deprived them of his advice the contract clearly must be treated as having been broken off through the default of the Defendants; and having been broken off through their default and misconduct, it follows that the Plaintiffs are entitled to have the £40,000 paid back, and that they are entitled to be protected from any action at law to recover damages on account of their having, as alleged, broken the contract.

MINUTES:—Vary decree, and declare that, under the circumstances in the Plaintiffs' bill appearing, the agreement of 12 Jan., 1870, ought to be set aside and delivered up to be cancelled: order that the said agreement be delivered up to the Plaintiffs to be cancelled accordingly. Dismiss appeal with costs.

Solicitor for the Plaintiffs: Mr. *J. H. Mackenzie.*

Solicitors for the *Telegraph Works Company* and Mr. *Gray*: Messrs. *Murray, Hutchins, & Co.*

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[1873 F. 221.]

Practice—Agreement for Compromise—How enforced.

In a redemption suit against the mortgagee in possession of business premises, a compromise was agreed upon, under which the mortgagor was to pay a fixed sum on a certain day, and the mortgagee was to carry on the business in the meantime, and give up possession on payment, and all proceedings in the suit were to be stayed. The mortgagor failed to pay the money at the time appointed:—

Held (reversing the decision of *Malins*, V.C.), that the agreement for compromise could not be enforced on motion in the suit, but a fresh bill must be filed for specific performance.

Semble, if an agreement for compromise relates simply to the prosecution of the suit, the Court will enforce its performance on motion in the suit.

THIS was an appeal from an order of Vice-Chancellor *Malins*.

The suit was instituted for the redemption of a mortgage of certain premises situate at *Long Ditton*, containing about eleven acres, the greater part of which was used as a brickfield, and which premises were mortgaged to the Defendant, *Henry Gardiner*

Gribble, by the Plaintiff, *Clement Pryer*, under certain indentures specified. The total of the different sums advanced at various times was alleged by the Defendant to amount to £5771. The Defendant was in possession of the property under the mortgage, and also of certain plant under a bill of sale. The Plaintiff gave notice of motion for decree in the suit on the 5th of December, 1874; but subsequently, with a view of avoiding the delay and expense of a contested suit, of a redemption decree, and consequent accounts and inquiries, and the delay which would occur before the Chief Clerk's certificate could be taken, an agreement for compromise was entered into between the Plaintiff and the Defendant.

This agreement was dated the 29th of December, 1874, and made between the Defendant and the Plaintiff, and was to the following effect: that the Plaintiff was to pay to the Defendant the sum of £4500, and in consideration of such sum the Defendant was to give up possession of the land known as the *Falmouth* brickfield, plant, machinery, horses, carts, bricks, and other materials upon the brickfield, and to release the Plaintiff from the payment of all sums due to the Defendant under the mortgage, and also under a bill of sale, together with all interest due upon such securities, and the Plaintiff agreed to release the Defendant from all liability in respect of the occupation of the brickfield and his dealings therewith. The brickfield was to be taken by the Plaintiff as from the 23rd of December instant, and all moneys owing to the Defendant up to that day were to be received by him, and all moneys owing by him were to be paid by him, and the Defendant was to guarantee the Plaintiff from the payment thereof. The brickfield business was to be carried on by the Defendant until the settlement of the purchase, and all expenses incurred by him in connection therewith were to be paid to him or allowed in settlement of account, the said Defendant receiving all moneys for sale of bricks up to that date, and accounting therefor. The Plaintiff agreed to pay the £4500, and to settle the purchase on or before the 15th of January, 1875. The Plaintiff agreed to give immediate instructions to stay all proceedings in the suit, and to pay his own costs, and the Defendant agreed to pay his own costs of such proceedings, and all matters in connection therewith. The Defendant agreed to give up to the Plaintiff, on the conclusion of

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the matter, all deeds and securities in his possession relating to the brickfield, and both parties agreed to execute all necessary legal documents to give effect to the agreement.

The money so agreed upon was not in fact paid by the Plaintiff on the 15th of January, 1875, and after several applications made by the Defendant for payment thereof, notice of motion was given for the 11th of March, that the said agreement of the 29th of December, 1874, might be ordered to be carried into execution, and that the Plaintiff might be ordered to pay by a short day to the Defendant the sum of £4500, with interest thereon at £5 per cent. per annum as from the 15th of January, when the same sum ought to have been paid, together with any other sums payable to the Defendant under such agreement, or else that the Plaintiff's bill might be ordered to be dismissed with costs, and that in either case the Plaintiff might be ordered to pay the costs of the application.

It was alleged by the Plaintiff that since the agreement the Defendant had sold an engine worth upwards of £300, and had made away with other property contrary to the terms of the compromise. The Defendant said that nothing had been parted with, except to a small amount, the value of which he was willing to allow in account.

The Vice-Chancellor was of opinion that he had jurisdiction to order the agreement to be carried into effect, and directed that the Plaintiff should within one month pay the sum of £4200 into Court, in default of which the bill to be dismissed with costs (1). From this order the Plaintiff appealed.

(1) 1875. March 18. WN 75 65

SIR R. MALINS, V.C.:—

This suit was instituted by a mortgagor against the mortgagee in possession of a brickfield. Various sums of money had been lent by the Defendant, amounting, as he alleged, to a sum of £5771, and the money not having been paid, the Defendant entered into possession of the property at the end of October, 1872, with a view to the sale thereof, and having become mortgagee in possession, he continued to carry on the brickmaking business. In December, 1873, the Plaintiff filed his bill for the redemption of the mortgage, and the parties, supposing that the expenses of taking the accounts in the suit and carrying it on to a hearing would be very considerable, entered into an agreement, which was a very reasonable and proper thing to do.

[His Honour then stated the effect of the agreement of the 29th of December, 1874.]

Mr. *Bagshawe*, Q C., and Mr. *Romer*, for the Appellant:—

This agreement cannot be enforced by motion or petition; there must be a bill filed to enforce specific performance of it. It

Now if a decree had been made in the cause, it would have resulted in the taking of the accounts between the Plaintiff and the Defendant; and on the certificate of the Chief Clerk being made, the amount due would have been found, and an order would have been made for payment by the mortgagor of the sum payable by him. But in consequence of this agreement the necessity of taking the accounts was done away with, since the amount due was agreed upon between the parties, and the time for payment was fixed. The matter was, therefore, taken out of the hands of the Court, and if it had stopped there, it was an agreement which the Court would have carried into effect. Mr. *Romer*, however, now says that this agreement can only be given effect to by means of another bill filed for that purpose. Now, to suppose that when such an agreement as this has been come to between the parties for the purpose of terminating the litigation, and where nothing has to be done but to pay a certain fixed sum on a fixed day, that such an agreement can only be enforced by means of another suit being instituted, would be utterly absurd. All I can say is that such a course is not, and never has been, the practice. In examining the cases which have been cited, it appears that where parties have entered into a complicated agreement to do things which are outside of the subject of the suit, then the agreement cannot be enforced without a suit, but if the agreement is only to settle that which is the subject of the suit, then it may be carried out either by petition or motion. Nothing can be more complete than the effect of this agreement; and as the Plaintiff has agreed to pay this particular sum of money on a particular day determined upon by the agreement, he must pay the money, or else the bill must be dismissed. He has, in fact, placed himself in the same position as if a decree had been made in the suit for payment of the amount found to be due from him upon a day specially named for that purpose. This is entirely in accordance with the case of *Dawson* v. *Newsome* (2 Giff. 272), where the agreement was to settle that which was alone the subject of the suit, and it was held that the agreement could be enforced upon petition; and in *Tebbutt* v. *Potter* (4 Hare, 164) the same thing was done upon motion. On the other hand, there is the case of *Askew* v. *Millington* (9 Hare, 65), where Vice-Chancellor *Turner*, upon a petition to enforce an agreement entered into by the parties to the cause to compromise the suit, refused to dismiss the bill or to stay the proceedings in the cause. But I find the effect of this decision considerably varied by what is stated in the second part of the marginal note, which is to this effect:—"The proper proceeding to enforce an agreement for the compromise of a suit, where such agreement goes beyond the ordinary range of the Court in such suit, or where the Court has in enforcing the agreement to adjudicate on equities distinct from the equity appearing in the record in the cause, is, by bill for specific performance, and not by interlocutory application in the existing cause." This shews, as the fact was, that it was not a simple agreement between the parties for a compromise of the suit; and I find that

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is not a mere compromise of the suit: it is a contract to do many things which were beyond the scope of the suit. Such a compromise has never been enforced by motion or petition in the original suit: *Askew* v. *Millington* (1); *Richardson* v. *Eyton* (2); *Forsyth* v. *Manston* (3). The only cases in opposition to this principle are *Dawson* v. *Newsome* (4) and *Tebbutt* v. *Potter* (5); but in both these cases there was a stipulation that the compromise should be made a rule of Court.

Mr. *Higgins*, Q.C., and Mr. *Kingdon*, for the Defendant:—

There is jurisdiction in this Court to enforce such an agreement as this. If one stipulation in the agreement is that the Plaintiff shall not go on with the suit, the Court will prevent him from doing so in fraud of the agreement. It was only on the Plaintiff's promise to pay the money on a particular day, that the Defendant

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all the observations of the Vice-Chancellor may be referred to the fact which is stated in the second portion of the marginal note, that the compromise went beyond the ordinary range of the Court in such a suit, and that the Court in enforcing the agreement would have to adjudicate on equities distinct from the equities appearing on the record. However, even in that case, I do not feel by any means certain that Vice-Chancellor *Turner* would not have taken a different view if he had had to decide the question a year later, when the Court was empowered by the new practice to do many things upon affidavit which could not previously be effected except upon a bill filed. Then I have also the case of *Forsyth* v. *Manton* (5 Madd. 78), where Sir *J. Leach* says: "The Court has no jurisdiction to enforce an agreement which is no part of the suit." That is, where a compromise is not to compromise the subject of the suit it cannot be enforced. Nothing could be more clear than that. I consider that I am following the decisions of *Dawson* v. *Newsome* and *Tebbutt* v. *Potter*, and I do not think that what was done in the case of *Askew* v. *Millington* was intended to interfere with the other cases.

So far, therefore, I think the case is beyond doubt; but it is said there ought to be a bill because the Defendant has deviated from the agreement. I think, however, that it was necessarily so, because there was to be a carrying on of the business. [After some further observations on this part of the case, His Honour said:—] The order I shall make will be that the Plaintiff do within one month pay into Court the sum of £4200, in default of which the bill to be dismissed with costs. But on the money being paid an account to be taken under the agreement, including an account of the property comprised in the agreement which has been dealt with in the meantime by the Defendant, and the Plaintiff to pay the Defendant's cost of this motion.

(1) 9 Hare, 65.
(2) 2 D. M. & G. 79.
(3) 5 Madd. 78.
(4) 2 Giff. 272.
(5) 4 Hare, 164.

was induced to agree to these terms, and unless the money is at once paid, we are entitled to have the bill dismissed. The Court must have summary power to prevent a party from going on with a suit after he has agreed to compromise it, without forcing the other side to commence fresh litigation: *Dawson* v. *Newsome* (1); *Tebbutt* v. *Potter* (2); *Rowe* v. *Wood* (3); *Roberts* v. *Berry* (4); *Whalley* v. *Lord Suffield* (5).

SIR W. M. JAMES, L.J.:—

I am of opinion that this order cannot be sustained. According to my view, it is against all the principles of the Court, and all the authorities that have been cited. An agreement of this kind, involving a great number of details, some of which would not have been within the subject of this suit, cannot be specifically performed upon interlocutory application. Some of them even, as far as I can see, could not have been made an order of this Court. The agreement is, that all moneys owing to the Defendant up to the 23rd of December, 1874, instant, shall be received by the Defendant, and all moneys owing by the Defendant up to the 23rd of December, instant, shall be paid by him, and he is to guarantee the Plaintiff against the payment thereof. Then the brickfield business is to be carried on by the Defendant until the settlement of the purchase, and all expenses incurred by him in connection therewith to be paid to him, or allowed in settlement of account, he receiving all moneys for sale of bricks up to that date, and accounting therefor. An order to that effect could not have been made in the suit at all, nor could the Court have made the order that the Defendant should hand over to the Plaintiff all deeds and other securities in his possession relating to the brickfield, or that both parties should execute all necessary legal documents to give effect to the agreement. It is a contract, the specific performance of which is beyond the scope of this suit, and cannot be obtained except by a suit regularly instituted for that purpose. If this were a simple agreement between the parties to stay a suit, or to have a bill dismissed, very likely the Court ought to give

(1) 2 Giff. 272.
(2) 4 Hare, 164.
(3) 1 Jac. & W. 315.
(4) 3 D. M. & G. 284.
(5) 12 Beav. 402.

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effect to that, as it would give effect to any other agreement relating solely to the conduct and prosecution of the suit. But when those matters are mixed up with a great number of details, money to be paid, and acts to be performed, it is far beyond the scope, as it seems to me, of an interlocutory motion, and far outside the jurisdiction of this Court on interlocutory motion. Perhaps it is to be regretted there should be this distinction; possibly under the new system which may come into operation in the ensuing month of November, there may be power in the Court to deal more summarily with these things, and possibly it may be right and convenient that the Court should make a proper order the moment it has ascertained the facts. But that has not hitherto been the practice of the Court. The Court has not thought proper to act except in suits regularly instituted, and the Court has not any jurisdiction, as it seems to me, to make an order of this kind in an existing suit the matter in which is partly within the agreement, any more than it would have a right to do it if no suit at all had been instituted. At present, the rules of the Court seem to me to preclude the order of the Vice-Chancellor. I am of opinion the motion ought to have been refused, and refused with costs. Of course there can be no costs of the appeal.

Solicitor for the Appellant: Mr. *W. Lund.*
Solicitors for the Respondent: Messrs. *Bridges, Sawtell, & Co.*

L. JJ. 1875 *July* 6.

MEMORANDUM.

Practice—Costs—Three Counsel.

SIR *W. M. JAMES,* L.J., at the sitting of the Court, stated that the Lord Chancellor, in concurrence with the Lords Justices, and after communication with the Taxing Masters, had laid down as a rule that the mere fact of a junior counsel in a cause having been appointed one of Her Majesty's counsel was not a sufficient reason for allowing, on taxation, the costs of briefs to three counsel.

In re WIGAN JUNCTION RAILWAYS ACT, 1875.

L. C.
1875
Aug. 10.

Vacation Business—Payment out of Deposit.

An Act authorizing the execution of part of the undertaking proposed by a railway bill, the rest being abandoned, provided for the return to the promoters of a part of the deposit. The Act passed so lately that no application could be made to the Court before the Long Vacation:—

Held (reversing the decision of *Bacon*, V.C.), that the obtaining payment of this sum out of Court was vacation business.

THE promoters of a railway bill paid into Court pursuant to the Standing Orders a deposit of £16,260. The Act only authorized the execution of a part of the undertaking, and provided that on the application of the promoters the Court of Chancery might and should order the repayment to them of £2265, being so much of the deposit as was attributable to the abandoned part of the undertaking. The royal assent was given so late in the session that an application to the Court could not be made before the Court rose for the Long Vacation.

A petition for payment out of this sum was presented and came on before Vice-Chancellor *Bacon* on the 31st of July, but His Honour ordered it to stand over till the first petition day in November. The matter was again mentioned to His Honour on the 10th of August, but he adhered to his former view, holding that such an application was not vacation business.

Mr. *Finch*, for the Petitioner, applied to the Lord Chancellor at *Westminster*.

LORD CAIRNS, L.C., said that in his opinion the order ought to have been made, and as the Vice-Chancellor would not sit again till the 17th, His Lordship made it, stating at the same time that this must not be considered as a precedent for making such applications to the Lord Chancellor.

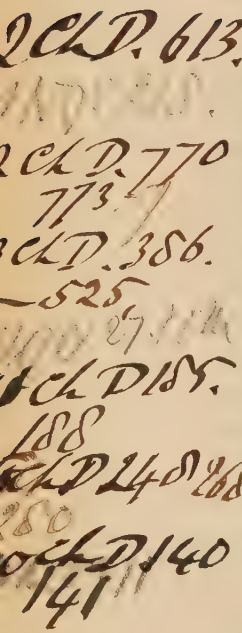
Solicitors: Messrs. *Sharpe, Parkers, & Co.*

L. JJ. 1875 June 23.

In re ARTHUR AVERAGE ASSOCIATION FOR BRITISH, FOREIGN, AND COLONIAL SHIPS.

Ex parte HARGROVE & CO.

*Company—Marine Insurance—Mutual Insurance Association—Names of Underwriters—*30 *Vict. c.* 23, *s.* 7—*Winding-up—Illegal Company—Association for Gain—Companies Act*, 1862, *s.* 4—*Delay.*



By the rules of a mutual marine insurance association formed in 1867, the members severally and respectively agreed to insure each other's ships for a year from the day named as the commencement of the risk. The two managers were to sign the policies, and their signatures were to bind the members as if each member had signed. The premiums were to be paid in advance, losses were to be paid out of the reserved fund thus created, and if it proved insufficient, the members were to contribute the deficiency *pro ratâ* according to the amounts for which they were insured. The managers were authorized to issue policies to members for periods less than a year, or for special risks either in time or voyage policies at special rates of premium, to which the reserve fund should in no way apply. The association was not registered or incorporated, and persons became members by effecting a mutual policy. Its policies were signed only by the managers "*per procuration* of the several members of the *Arthur Average Association* for insuring each other's ships." The managers issued special rate policies to a large amount to persons who had not taken mutual policies. In 1870 an order was made for winding up the association. *H. & Co.*, who were holders of special rate policies, but had not taken out any mutual policies, were found creditors to a large amount on their special rate policies. On an application by a contributory to vary the certificate by expunging their debt:—

Held, by the Master of the Rolls, (1), that the association came within the *Companies Acts*, 1862, s. 4, and ought to have been registered; that it was therefore an illegal company, and that an order for winding it up ought not to have been made, but that this objection could not be entertained on the present application:

(2.) That the policies of *H. & Co.* were void under 30 Vict. c. 23, s. 7, because they did not specify the names of the subscribers or underwriters:

(3.) That those policies were also void as being *ultrà vires*, for that the rules only authorized the managers to issue special rate policies to persons who were already members by having taken out policies of mutual insurance:

Held, on appeal, that the policies were void for non-compliance with 30 Vict. c. 23, s. 7.

THIS was a motion by *Hargrove & Co.* by way of appeal from an order of the Master of the Rolls, expunging their debt from the

list of debts allowed in the winding-up of the *Arthur Average Association for British, Foreign, and Colonial Ships.*

The association was a mutual insurance association formed in 1867, not incorporated nor registered. Its rules, so far as it is necessary to state them, were as follows:—

"1. The members of this association severally and respectively, and not jointly nor in partnership, nor the one for the other, but each only in his own name, do hereby agree to insure each other's ships for one year, from noon of any day named as the commencement of risk, against all losses, perils, and damages described in the form of policy hereto annexed, and subject to the conditions indorsed on the said form of policy, and to these rules and regulations, which shall be binding and conclusive on all the members of the association. The managers of this association shall be *James Jackson* and *William Sheppard*, and either of them may sign their firm name of *Jackson & Sheppard* to all policies of insurance in the name of this association as the managers thereof, and the signatures thus given by either of the said managers shall be binding and conclusive on all the members of this association, and shall have on each and all of the said members the same legal effect as if each and every member had personally signed such policy. The said managers shall decide in what section any ship shall be included, the premium to be paid for the same, and the allowance for laid-up premium. The value of the ship shall be indorsed on the policy.

"2. Ships classed in French *Veritas*, American *Lloyd's*, or any other authorized society's books for the classification of ships, may be admitted by computation according to corresponding class in British *Lloyd's*, and shall be divided into sections marked *A*, *B*, *C*, and so on successively, and paying different annual rates, as agreed on at the time of entering the association, or at the commencement of any subsequent year, on the sum insured. Premiums to be payable in advance by quarterly proportions by members' acceptance of managers' drafts at three months' date (if paid in cash discount of £5 per cent. per annum will be allowed), and to be placed to the credit of each respective member. Should their amount exceed the amount of claims for losses or damage sustained by the members during each year respectively, such excess shall

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stand to the credit of each mutual member proportionately as he may have contributed, and should it be that such contributions are not sufficient to meet the claims of members for loss or damage sustained within any respective year, then such credited amounts shall be applied to meet such deficiency, and should there still be a deficiency, such sum as may be required to meet the same shall be drawn for on each respective mutual member in such proportion as they bear to each other.

"3. The managers shall also have authority to issue policies to members for periods less than a year or for special risks, either in time or voyage policies, in consideration of special rates of premium to be fixed by the said managers, to which the reserve fund shall in no way apply, also to allow brokerage and discount to insurance brokers."

These rules, with others which it is unnecessary to mention, were annexed to the ordinary mutual policies, such as were mentioned in Rule 1, and a person became a member by taking a mutual policy of that nature.

Special rate policies to a large amount were issued under Rule 3 to persons who were not holders of any of the ordinary mutual policies mentioned in Rule 1. On the 29th of March, 1869, the managing committee made an alteration in the rules expressly sanctioning the issue of such special policies to persons not already members; but the alteration did not appear ever to have been confirmed by a general meeting, which was requisite to effect a valid alteration in the rules.

The policies issued were signed "*Jackson & Sheppard, per procuration* of the several members of the *Arthur Average Association* for insuring each other's ships, every member bearing his equal proportion according to the sums mutually assured therein, excepting members paying special rates." The rules were not annexed to the special rate policies.

On the 12th of February, 1870, an order was made for winding up the association. Messrs. *Cory* and *Hawksley* were settled on the list of contributories in May, 1871. On the 20th of December, 1873, the Chief Clerk made a certificate finding upwards of £17,000 due to holders of special policies, among whom were *Hargrove* &

Co., who were not holders of any ordinary policies. This certificate was filed in January, 1874. In June, 1874, the official liquidator took out a summons for a call, and thereupon Messrs. *Cory* and *Hawksley* took out a summons to have the debt of *Hargrove & Co.* expunged, although the time limited by Cons. Ord. xxxv. rule 52, had elapsed.

The Master of the Rolls was of opinion that there were special circumstances sufficient to make it proper to review the certificate after this lapse of time; and that the policies held by *Hargrove & Co.* were void, because the names of the underwriters were not specified as required by 30 Vict. c. 23, s. 7. His Honour therefore expunged the debt of Messrs. *Hargrove & Co.* (1), who now appealed.

(1) 1875. April 28.

SIR G. JESSEL, M.R.:—

The question before me is complicated with another, that is, whether this association, as it is called, should have been wound up at all, or, if wound up at all, whether it should not have been wound up in a different way. As I understand the decision in the case of the *London Marine Assurance Association* (Law Rep. 8 Eq. 176) (which followed other cases), where the application is to strike out a debt or to obtain an order for a call, or anything which may be called a subsidiary application in the winding-up, it is not open to any party to say that the winding-up order ought not to have been made. Therefore an objection which amounts to this, that there was no jurisdiction to make a winding-up order, or that the winding-up order for some other reason ought not to have been made, is not in the present case admissible.

Now, the first objection taken to the debt which has been proved (there are in fact several debts, but for this purpose we may treat them as one), which is a claim under a policy for insuring a ship entered into with the managers of the *Arthur Average Association*, was, that the *Arthur Average Association* was an illegal body, by reason of its not having been registered under the *Companies Act*, 1862, although formed after the passing of that Act; and it was said that, being an illegal body, it could not authorize an agent to contract on its behalf; in other words, that an illegal body could not enter into a valid contract of agency, and that any person dealing with the alleged agent, and having notice of the nature of the body, which of course all these applicants had, could not avail himself of such a contract of agency with the view of charging the alleged principals.

Now, that involved another proposition, that this was an association coming within the 4th clause of the *Companies Act*, 1862; and although I do not think I am absolutely compelled to decide this question, yet, it being a question of very considerable importance, on which I have heard a great deal of argument, and as to which I have formed an opinion, I think it right to express that opinion, that it may be

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Mr. *Chitty*, Q.C., and Mr. *Robinson*, Q.C., for the Appellants, urged that *Cory* and *Hawksley* were debarred from relief by

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brought before the Court of Appeal if this case goes further, or before other Judges when similar questions come to be discussed. The 4th section of the Act provides that "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any other business" [*i.e.* other than banking] "that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act." The only other section which I am aware of which throws any light on the meaning of that section is the 21st section, which is in these terms: "No company formed for the purpose of promoting art, science, religion, charity, or any other like object not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land, but the Board of Trade may, by license under the hand of one of their principal secretaries or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit."

It is to be observed that the objects mentioned in the latter section are all objects which, according to the definition which the Court of Chancery gives to the words "charitable objects," are charitable objects. They are all objects which, if described in a testator's will as the objects of bounty, could be well supported as a charity, and therefore the "like objects" are obviously objects of the same sort. It was quite right to put in the words "not involving the acquisition of gain by the company," because, no doubt, under the cloak of religion or charity you might establish a company which really had the private gain of the individuals in view. Therefore that restriction was very properly inserted. But the words describing the objects, I think, throw some light upon what was meant by gain. All the objects mentioned are such as *primâ facie* would lead to expenditure as distinguished from profit. In other words, a company or an association formed for any of those objects would rather be a company or an association formed to regulate the spending of the members' money than the acquisition of any money by any of the members; it would be in the position of a company for giving away or spending as distinguished from a company for getting or acquiring anything. We see, therefore, that the Legislature had in its contemplation companies and associations formed for charitable objects, or similar objects, which include the expending or giving away of money by the members of those companies or associations.

The 4th section applies to companies or associations having for their object the acquisition of gain either by the company or association or the individual members thereof. Now, if you come to the meaning of the word "gain," it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word "pecuniary" so to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not

delay, and on the merits they referred to *In re London Marine Insurance Association* (1); *Smith's Case* (2); *Martin's Claim* (3); *Dowell* v. *Moon* (4); *Reid* v. *Allen* (5); *Dowdall* v. *Allan* (6).

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"gains," but "gain," in the singular. Commercial profits, no doubt, are gain, but I cannot find anything limiting gain simply to a commercial profit. I take the words as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything.

If this, then, is the fair meaning of the word, what is the constitution of the association which I have to deal with? It is said that a contract for mutual indemnity is not within the meaning of that clause. What is a contract for mutual indemnity? If *A.* and *B.* enter into a mutual contract that if either of them incurs a loss of a certain kind the other shall make it good, that is a contract of mutual indemnity. But the contracts in the present case are very different things. This is simply an association of people, by the rules of which it is agreed that everybody who wants to insure a ship against loss, shall pay, by way of premium, a certain sum of money, depending on the nature of the ship insured, that is, on the nature of the loss to be guarded against. The sums of money are to go into a common fund, and the common fund so raised is to be applied in payment of the losses, as far as it will go, and, if deficient, the losses are to be made good by the members, not in proportion to the sums subscribed, as I understand it, but in proportion to the sums assured, which of course is a very different thing. In addition to these policies there may be policies for periods of less than a year, and policies for special risk, in respect of which, as I read the rules, the members are not liable to contribute anything beyond their premiums. Then the result is this: the association insures the ships with a view certainly of getting enough money in the shape of premiums at least to pay the losses, to pay the expenses, and to have something over in the shape of a reserve fund. Why is not that an association made for the purpose of profit, even using the term "profit" instead of "gain"? Between the association and its members it carries on business with a view of getting more than it shall pay. It must acquire the difference. It contemplates the acquiring it. It is formed for the purpose of acquiring, first of all, the sums wanted for the expense of carrying it on, and, secondly, the sums to form a reserve fund at the end of the year. It is quite true that the reserve fund may be ultimately divided, but it is not divided and given back to the people who have paid too much, but to another class; because, as I understand, it is a limited reserve fund, although it stands to the credit of each member proportionately, as he may have contributed; it is a reserve fund which does not arise from the policies of less than a year, or from special risk

(1) Law Rep. 8 Eq. 176.
(2) Ibid. 4 Ch. 611.
(3) Ibid. 14 Eq. 148.
(4) 4 Camp. 166.
(5) 4 Ex. 326.
(6) 19 L. J. (Q.B.) 41.

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Mr. *Fry*, Q.C., Mr. *North*, and Mr. *Hilbery*, for Messrs. *Cory* and *Hawkesley*, and Mr. *Southgate*, Q.C., Mr. *Waller*, Q.C., and Mr. *E. C. Willis*, for the official liquidator, were not called on.

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policies, for to them the reserve fund shall in no way apply. So that I understand that members, or those who pay premiums for time voyages or special risks, do not get any share of the reserve fund. That is how I read Rule No. 3. The result, therefore, is that there is, as between the association and its members, a gain. The association acquires something. But then I think individual members obtain a gain. If an individual member loses his ship, he gets his ship paid for, and he gets a proportion of the reserve fund—not merely his share that he has contributed to it, but his share, besides the share of the other members who have got time policies, or policies on special risks—for of course the theory on which the rules of the association are framed, is that everybody pays more than is absolutely necessary, otherwise the expenses could not be paid, nor the insurances carried on. That being so, it appears to me that the members acquire something. But I am not prepared to say that, even independently of that consideration, an association by which people are indemnified from losses in carrying on any trade, is not an association for gain. Suppose you effect an insurance on freight, what is the freight? The freight is composed partly of the expenditure of a shipowner, partly of a profit—the profit of carrying on his trade. If he insures his freight, he insures his actual profit of carrying on his trade—that is, he secures himself his profit. Is not that a gain? An insurance is not always what it is called—an indemnity against loss—for where it secures to the insurer both the cost and the profit, it is not pure indemnity. It seems to me that the Act broadly means this: all commercial undertakings shall be registered. It distinguishes in so many words—it intends to distinguish—between commercial undertakings on the one hand, in which insurance companies certainly are included, for there are special provisions relating to them, and what we may call literary or charitable associations on the other hand, in which persons associate, not with a view of obtaining a personal advantage, but for the purpose of promoting literature, science, art, charity, or something of that kind. If that broad distinction is kept in view, I think there will be no difficulty in putting a fair and reasonable, and also a literal and grammatical construction on the words of the Act. In my opinion, whether the persons who were entitled to take out time policies, and special risk policies, were or were not to be members of the association, the association in question was one formed for the purpose of gain, within the meaning of the 4th section, and required registration.

It is then urged that this association ought not to have been wound up under the 199th section. That is my present impression. There are provisions for registering an association for the purpose of being wound up, and it does not appear to me that the unregistered association pointed out in the 199th section was intended to include an illegal association formed after the passing of the Act. I think it must have meant that the unregistered association contemplated was a legal association which might have been unregistered because it was formed before the

SIR G. MELLISH, L.J.:—

I am of opinion that the order of the Master of the Rolls is correct. The 7th section of the 30 Vict. c. 23, says: "No contract

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passing of the Act, or because it was excepted, for it is not every association which requires registration. I think, therefore, that the Court ought not to wind up an illegal association. But that argument proves too much, for it makes the association illegal in any event, and therefore, if well founded, would destroy the validity of the winding-up order, and consequently is not admissible for the benefit of the applicants on the present occasion.

I therefore pass to the objection that this is a marine policy, and that the Act 30 Vict. c. 23, avoids it unless the names of the assurers are specified. Now this association was one of a very peculiar character: "The members of the association severally and respectively, and not jointly or in partnership, nor the one for the other, but each only in his own name, do hereby agree to insure each other's ships for one year, from noon of any day named as the commencement of the risk." Then the 3rd rule says this: "The said managers shall also have authority to issue policies to members for periods less than a year, or for special risks, either in time or voyage policies, in consideration of special rates of premiums to be fixed by the said managers, to which the reserve fund shall in no way apply." I read that as meaning that when a person is already a member of the association he may effect a policy as to which he would have no right to the reserve fund, and no liability to contribute to the reserve fund; he pays his premium, and there is an end of the matter. But if a loss occurs under this special policy, he is entitled to call upon the other members of the association, including also himself, to the extent to which he is liable under an ordinary policy current when the loss occurs, to contribute to that loss. But as I understand it, the proportion in which he has to contribute would be measured without any regard whatever to the amount for which he has insured by his special policy. He would be liable in respect of his mutual policy to make contribution to this loss, assuming always that the loss occurred within the period of one year from the time of his mutual policy issuing. But if the mutual policy expire before the loss on the special rate policy, I do not see that he is under any liability. He is only liable, as I understand, from the noon of any day to the noon of the same day in the following year. So that it may well be that, though he was a member at the time when the policy was issued to him, he may have ceased to be a member before the loss occurred, and consequently he would be entitled to call upon the other members who had still current policies to contribute to the fund required to indemnify him, but would not be entitled to call upon the members whose policies had expired. And this shews the difficulty of finding out who are the insurers, because the persons intended to be liable are not ascertained persons at the time when the insurance is effected, but in the case of a special rate policy it can only be ascertained who they are when you know that the loss has occurred.

Now the only signature to the policy is the signature of Messrs. *Jackson & Sheppard* "*per procuration* of the several members of the *Arthur Average*

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or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the *Merchant Shipping Act Amendment Act*, 1862), shall be valid unless the same is expressed in a

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Association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually assured therein, excepting members paying special rates." I think that is accurate. I think that rule does, as far as I understand the rules—for, as I say, they are not very artistically framed—express what they meant, that is, every member not being a special rate insured member, should pay his equal proportion. It means that the members who have paid special rates are not to pay any more. Then the result of that is this, that you actually do not know who insure. The members, as I said before, are only liable for a year from the date of their own policies, and if the loss occurred, as I have already explained, after any man's policy expires, he is not an insurer. To suppose that that is a specification of the names as required by the Act of Parliament seems to me a most remarkable conclusion for any person possessed of ordinary powers of reasoning to arrive at. I was told that it was concluded by authority. I do not always bow to the authority of a Court of co-ordinate jurisdiction, but I endeavour to do so if it is possible, and if a unanimous decision of a Court of Common Law had been brought to me to say that that was a specification of the names of the insurers, I am not prepared to say that I should not have followed it. But I am relieved from considering that point, because the decisions by no means go to any such extent. The only decision bearing on the point was this, that where the insurer consisted of a firm, an ordinary common partnership carrying on business, the statute was complied with by stating the name of the firm. That does not appear to me to have any direct bearing on the argument before me, and the only indirect bearing it has is that which was put forward so frequently by Mr. *Chitty*—that it was an evidence of the liberality of Courts of law in construing this statute in favour of the insured. The only names I find on this policy are *Jackson* and *Sheppard*. I find the names of no one else. They purport to sign on behalf of the members of the *Arthur Average Association*, but that is not right; the then present members of the *Arthur Average Association* were not the people who were to insure, and it could not be ascertained till a future period who were the insurers. There is not even a correct description of the class of insurers. It must also not be forgotten that the rules themselves are not on the policy; and it is impossible to find out from the policy who were to be liable. Therefore the argument in the case of *Dowell* v. *Moon* (4 Camp. 166) does not apply. There were no means of ascertaining from the policy itself who the insurers were to be, and I am of opinion that that objection is fatal to the policy, and that it is not necessary to consider the next objection.

The next objection, however, appears to me to be a very serious one, and I cannot see any satisfactory answer to it. It appears that the rules were altered on the 29th of March, 1869, by striking out the word "members" in the third rule, so that the managers might issue policies to any one for special risks or on voyage policies. This appears to have been done not according to the rules at a general

policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars

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meeting, but at a meeting of the committee. Besides this, Mr. *Cory*, one of the applicants before me, was insured by policies the last of which was dated on the 8th of September, 1868; he, therefore, is not bound by alterations made in March, 1869, and he never authorized his credit to be pledged. I need not enter into the question, whether the other applicant, Mr. *Hawkesley*, sanctioned the alterations, for according to the present rule in suits as regards misjoinder it is enough that Mr. *Cory* alone could support the application.

Then, there being no valid alteration, the third rule appears to me to authorize the manager to issue special rate policies to members only. It was argued that the mere issuing of a policy to a person on these terms makes him a member, but I am unable to accede to that. Members are defined to be persons who insure for a year, and insure each other's ships for that year, and make contributions for that purpose. But Messrs. *Hargrove & Co.* never insured anybody for a year, or for any time whatever. They simply paid a premium, as every person effecting an insurance does, and it seems to me to be an abuse of terms to say that a man who pays a premium thereby pays a contribution to the insurance of his own ship. That is not the meaning of the rule. The plain and literal and the common sense meaning coincide in this case as they generally do, and in my opinion the issuing of a policy to any person not already a member was not authorized by this rule, and consequently the act of the agents was wholly unauthorized, the power of attorney under which they acted or assumed to act did not confer upon them the authority to enter into this contract, and consequently the contract itself does not bind the association. It appears to me that persons who enter into these contracts have no right to complain if an objection of this kind is taken, they must have had notice of the nature of the body on whose behalf the agents professed to act, and, of course, notice of the rules and regulations which form the constitution of that body. Considering the importance of the question to the parties, and the nature of the objections, I thought it right to give my opinion on this objection also.

On these grounds, the only conclusion I can come to is that if the question of delay is not decided adversely to the applicants, the alleged creditors are not creditors of the association, and their debts ought not to be allowed. Now the question of delay is, to a certain extent, no doubt, to be dealt with as a matter of discretion. The law seems to me to stand in this way. By a General Order, which was authorized by Act of Parliament, the ordinary practice of the Court of Chancery has been extended to winding-up cases, and according to the ordinary practice of the Court of Chancery, after a Chief Clerk has made a certificate, and eight days have expired, you cannot vary that certificate except on special grounds. The nature of those special grounds has nowhere been strictly defined, but it must be something substantial, and the

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shall be omitted in any policy, such policy shall be null and void to all intents and purposes." The Legislature, therefore, says, in the plainest possible terms, that the names of the subscribers or underwriters are to be inserted in the policy, and in case that is omitted then the policy is to be null and void to all intents and purposes.

The policy in the present case, is signed "*per procuration* of the several members of the *Arthur Average Association* for insuring

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application must be made at a time when acceding to it will not very much vary the position of the parties. Now in the present case it must be remembered that the certificate is obtained by the official liquidator, who in a sense represents everybody, and the persons who now apply did not directly intervene in the matter. They are, therefore, not in quite as bad a position, if I may say so, as parties to a suit who are present when the decision is given, there was nothing to call their attention to the matter until it was aroused by an attempt to make them pay something. In the next place the creditors have done nothing more than prove; they have not obtained a dividend, and they have not obtained a call, therefore their position is not affected except to the extent of any costs they may have incurred subsequently, and which the Court may give them. And, thirdly, it must be, and no doubt will be, considered that the questions upon which the official liquidator at first had to decide, and the questions which the Court has now to decide, are not matters which every one can decide for himself—they are not matters so plain, so clear, and so easy that every policy-holder must be considered to have known them from the beginning, and to have stood by and acquiesced in what has taken place. The length to which this argument has gone, and the nature of the discussion which has taken place, I think will be sufficient to shew that. Looking, therefore, to the fact that in other cases as great an amount of delay has not been considered sufficient to induce the Court to say that the rights of the parties are finally established, and considering that the special reasons I have mentioned are to my mind very strong indeed, I think there is no such delay as should preclude the applicants from the relief to which they would otherwise be entitled. That being so, I think the proper order to make is to expunge the debts; and considering that the creditors have been brought here after this lapse of time, I think it would be only right to provide for their costs, as well as for the costs of the applicants and the official liquidator, out of the estate subject to the winding-up. I think, inasmuch as there may be a question as to whether the creditors or alleged creditors are not entitled to obtain a return of their premiums from somebody, it would be right to add to the order that it is made without prejudice to any application which they may be advised to make to obtain the return of the premiums they have paid.

each other's ships, every member bearing his equal portion according to the sums mutually insured." There is considerable doubt as to what those words mean, whether they mean what is their natural meaning, that the existing members of the *Arthur Average Association*, each in proportion to the sum for which he is insured, are to be the underwriters of this policy or whether they mean what, if you are to import the rules of the *Arthur Average Association*, they must have been intended to mean—not the persons who are the members at the time when the policy is executed, but the persons who are the members at the time the loss accrues, because those are the persons who are liable according to the rules. If a man insures for a year, when his year is over he is not liable for any loss which occurs afterwards. It appears to me to be unnecessary to decide which of those two constructions is right, because whichever of them is right, I entirely agree with the Master of the Rolls that the requisition of the statute is not complied with. It appears to me that there is a material distinction between this case and the cases which have been referred to in the discussion. It has been held that where a company or partnership grants a policy, however numerous the members of the company or partnership may be, it is sufficient to insert the name by which the firm carries on its business, and that it is not necessary to insert the name of every individual member of the firm. No doubt that is giving a liberal construction to the Act; but the probability is very great that the Legislature intended that a partnership should be entitled to insure, and a partnership practically could not insure if it was necessary that the name of every partner should be inserted. In this case there is an insurance by which every member is severally liable for his own portion, and it is impossible to put any construction upon the words of the Act such as not to require the name of each of those persons to be specified, because undoubtedly the *Arthur Average Association* as an association in its joint capacity is not the underwriter, but each member, in proportion to the sum insured, becomes individually an underwriter. The Act, therefore, requires his name to be mentioned in it, and if not, the policy is to be absolutely null and void. The names are not mentioned, and therefore the policy is absolutely

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null and void. I am of opinion that the appeal must be dismissed.

Sir W. M. James, L.J.:—

I entirely agree. It is unnecessary to go into the other points of this case; but I have read the judgment of the Master of the Rolls, and it would require some argument to make me differ from him upon any of them.

A discussion then took place as to costs.

Sir W. M. James, L.J.—

Looking at the great hardship of the case, we are not disposed to make the Appellant pay any costs of this appeal. Although he has failed, no doubt it is a great hardship to him, considering that he has paid his money and received nothing in exchange. He has been for years, or at all events for a long time, allowed to remain in the belief that he was entitled to stand as a creditor for the claim. When the matter came before the Master of the Rolls he decided, no doubt upon several grounds, against him. It is a very large claim, affecting not only him but other persons, and it is of great importance to the association to have the whole thing settled finally by this Court, therefore I think we can hardly make him pay any costs, but the Lord Justice thinks with me that it would be going too far to give him the costs of the unsuccessful appeal. He will have to bear his own costs, and the Respondents, including the official liquidator, will have their costs out of the estate.

Solicitors: Mr. *F. W. Hilbery;* Mr. *W. W. Wynne;* Messrs. *Westall, Roberts, & Barlow.*

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[1874 J. 120.]

Marriage Settlement—Construction—Vesting—Leaving Issue—Death in Lifetime of Parents.

By a marriage settlement, reciting an intention to provide for the husband and wife and their issue, a fund was settled in trust for the husband for life, then for the wife for life, and after the death of the survivor, if they should leave any issue who being daughters should marry or attain twenty-one, or being sons attain twenty-one, to transfer the fund unto and equally among all such issue when they should attain twenty-one, or be married if a daughter or daughters with consent; and in the meantime, and until the said issue should attain twenty-one or be married as aforesaid, to pay the income for their maintenance: Provided always, that if any such issue as aforesaid should happen to die before they should respectively become entitled to and actually receive their portions, leaving issue of their respective bodies them surviving, then such last-mentioned issue should take and be entitled to his, her, or their father's or mother's share or shares equally among them, to be paid and transferred at the same time or times as was declared concerning the whole original trust-moneys and the immediate issue of the marriage. There was a gift over if the husband and wife should die without leaving any issue of their two bodies begotten, or being such, they should all die before they should respectively become entitled to receive their portions and without leaving issue. Two of the four children of the marriage died infants and unmarried in the lifetime of their parents. Another attained twenty-one and died a bachelor in the lifetime of the father, and the fourth attained twenty-one and survived both parents:—

Held (reversing the decision of *Hall*, V.C.), that the representative of the child who attained twenty-one and died in the lifetime of the father took nothing; but that the whole fund went to the survivor.

Woodcock v. *Duke of Dorset* (1) explained.

THIS was an appeal from a decision of Vice-Chancellor *Hall* on the construction of a marriage settlement.

By an indenture of settlement, dated the 17th of November, 1818, and made between *Joseph Burbidge* of the first part, *Thomas Turland* of the second part, *Susannah Turland*, spinster, daughter of *Thomas Turland*, of the third part, and three trustees of the fourth part, after reciting that a marriage was intended to be shortly solemnized between *Joseph Burbidge* and *Susannah Turland*, and that upon the treaty for the marriage it had been agreed

(1) 3 Bro. C. C. 569.

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between *Joseph Burbidge* and *Thomas Turland* that "in order to make a provision for the said *Joseph Burbidge* and *Susannah Turland* and their issue, in case the said marriage should take effect," *Burbidge* should give to the trustees his bond, bearing even date with the settlement, for payment to them of £2000, with interest, from the time of the solemnization of the marriage on the 5th of April then next; and that *Turland* should, by his bond of the same date, become bound to the same parties for payment to them at the same time of £1000, with interest, from the solemnization of the marriage; which sums it was agreed between them should be applied by the trustees in manner thereinafter mentioned, and reciting the giving of the bonds, it was declared and agreed that if the marriage should not take effect before the 5th of April then next the bonds should be delivered up to the obligors; but that if the marriage should be solemnized before that time, then the trustees should receive the moneys secured by the bonds, and invest the principal as therein mentioned, and pay the income to the husband during his life, and after his death to the wife during her life, the ulterior trusts being as follows:—And from and after the decease of the survivor of them, the said *Joseph Burbidge* and *Susannah Turland*, then, in case they should leave any issue of their two bodies begotten, which being a daughter or daughters should live to be married or attain the age of twenty-one years, or being a son or sons should live to attain the age of twenty-one years, upon trust to pay, assign, and transfer the said principal money and securities upon which the same might be then placed unto, between, and equally amongst all such issue (if more than one), share and share alike, as and when they should respectively attain the said age of twenty-one years, or be married if a daughter or daughters, with the consent of the said trustees, unless such marriage should happen in the lifetime of the said *Joseph Burbidge* or the said *Susannah*, his intended wife, in which case such consent of the said trustees should not be necessary, but the consent of the said *Joseph Burbidge* and *Susannah Turland* respectively only. And if there should be but one such child of the said marriage, then upon trust to pay, assign, and transfer the same to such only child, his or her executors, administrators, and assigns, for his, her, or their own use, as and when he or she should

attain the said age of twenty-one years, or being a daughter be married as aforesaid. And in the meantime, and until the said issue of the said intended marriage should attain their said respective ages of twenty-one years, or be married if a daughter or daughters as aforesaid, upon trust to pay and apply the interest to arise from the said trust moneys unto, and to and for the maintenance, benefit, and support of the said issue of the said *Joseph Burbidge* and *Susannah Turland* in such manner as to them, the said trustees, should seem proper: provided always, that if "any such issue as aforesaid" should happen to die before he, she, or they should respectively become entitled to and actually receive his, her, or their portion or respective portions under the settlement, leaving lawful issue of his, her, or their body or respective bodies him, her, or them surviving, then and in such case it was declared that such last-mentioned issue should take, have, and be entitled to his, her, or their father's or mother's share or shares, as the case might be, equally between and amongst them, if more than one, share and share alike; and if but one, then such one should take, have, and be entitled to the whole of such share or shares as aforesaid, the same to be paid, assigned, and transferred accordingly by the said trustees unto such last-mentioned issue or respective issues as aforesaid at the same time and times respectively, and the interest thereof respectively be in the meantime by them, the said trustees, paid and applied for the benefit of such last-mentioned issue or respective issues as aforesaid, at such time or times as was thereinbefore limited and declared relative to and concerning the whole original trust-moneys and the immediate issue of the said *Joseph Burbidge* and *Susannah Turland* as aforesaid. But in case the said *Joseph Burbidge* and *Susannah Turland* should depart this life without leaving any issue of their two bodies begotten, or being such, they should all die before they should respectively become entitled to receive his, her, or their portion or respective portions under the settlement, and without leaving issue of his, her, or their body or bodies as aforesaid, then upon the trusts therein mentioned, the short effect of which was, as to the husband's fund, as he should appoint by will, and in default for his next of kin, and as to the wife's fund as she should by will appoint, and in default for her next of kin.

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There were four children of the marriage. The two eldest died in childhood, in the lifetime of both parents. *Joseph Burbidge*, the third child, survived his mother, attained twenty-one, and died a bachelor and intestate in the lifetime of his father. *Thomas Turland Burbidge*, the youngest child, survived both parents, and attained twenty-one.

Under these circumstances the question was, whether the whole fund belonged to the surviving child, or whether *Joseph Burbidge* acquired an indefeasibly vested interest in one moiety. Vice-Chancellor *Hall* decided in favour of the latter view (1). *Thomas Turland Burbidge* appealed.

(1) 1875. May 8. W.N. (1875) 101

SIR CHARLES HALL, V.C.:—

The object of the settlors was to provide a fund for the issue of the marriage. If there be any doubt as to the meaning of the words used, the Court must struggle to put such a construction upon the settlement as will let in all the children of the marriage who attained twenty-one years, whether they did so in the lifetime of their parents or not. If the construction contended for by the surviving son be adopted, a child who attained twenty-one and married and died before his surviving parent, could not provide for his wife or children. The settlement being a marriage settlement, the Court should so construe it as to give effect to the presumed intention of the parties. Moreover, in the present case there is a recital that it was intended to make a provision for the husband and wife and "their issue," not and some of their issue, or such of their issue as afterwards mentioned. In *Currie* v. *Larkins* (4 D. J. & S. 245, 253) Lord Justice *Knight Bruce* said: "Upon the construction for which the Appellant contends, the son who attained majority and his family would have been equally excluded, if that son, instead of dying a bachelor, had died in his father's lifetime, leaving a widow and children surviving the father. Neither upon principle, nor upon authority, considering that the instrument was a pre-nuptial settlement, is it possible to adopt such a construction in the absence of words absolutely compulsory. If the words are absolutely compulsory they must be submitted to, but not otherwise." In the present case there are two sets of trusts on failure of issue, each of which is, as expressed, to come into operation on the death of Mr. and Mrs. *Burbidge* "without leaving any issue"—that event would not happen were there living at the death of the surviving parent issue of a son dying before the decease of the surviving parent. It is also observable that the trust for the issue of children is declared by reference to a trust described as being "for the immediate issue" *i.e.* the children, not for some of the immediate issue, *i.e.* such of the children as survive both their parents. Lord *Eldon*, in *Hope* v. *Clifden* (6 Ves. 509), said, the Court must struggle with the language so as to let in sons who have attained twenty-one and died before their parents, and that it was his inclination and duty to follow the previous cases, which he said were a great many, he referred particularly to *Emperor* v. *Rolfe* (1 Ves. Sen. 208) and *Woodcock* v. *Duke of*

Mr. *Joshua Williams*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Finch*, for the Appellant:—

This is a case to which the principle of *Woodcock* v. *Duke of Dorset* (3 Bro. C. C. 569), and Lord *St. Leonards* has said in several cases that the Court struggles with strong expressions to let in sons attaining twenty-one although dying before their parents. In *Kimberley* v. *Tew* (4 D. & War. 150) he says, in furtherance of this principle, the Court has read the word "leave" "have," referring to some authorities, and in *Clayton* v. *Earl of Glengall* (1 D. & War. 17) he says: The Court has gone great lengths and struggled with strong expressions in favour of the real objects of such deeds (marriage settlements). There is in the present case a provision for maintenance of the "said" issue, which expression occurs twice. Now the only issue mentioned in the previous trusts are daughters who attain twenty-one or marry, and sons who attain twenty-one, but the provision for maintenance is only to last until daughters attain twenty-one or marry, and sons attain twenty-one; and therefore if this provision be literally interpreted, there is no provision for maintenance at all. This shews that the words descriptive of issue which are inserted in the settlement should not be rigidly construed. There is also a provision that if any "such" issue should die before becoming entitled to and actually receiving his or her portion, leaving issue surviving them, then such last-mentioned issue shall take their parent's share. Here there is an intention that issue of deceased children shall be provided for, but, according to the contention of the surviving son, this provision is applicable only to issue of children who survive their parents. If it be construed as applying to the children predeceasing their parents it would seem to shew that such children are objects of the previous trusts. Where the settlement contains a provision substituting for their parents issue of "all" children predeceasing the tenant for life, there is afforded thereby an argument against applying the principle in question, but such argument is not, I think, afforded, or if afforded at all, not afforded so as to furnish an argument of sufficient weight to exclude the application of the principle by a provision which falls short of providing for the issue of all children who die leaving issue; instead of this being the case, it may be deemed to afford an argument in favour of applying the principle, it being irrational to impute an intention to the settlors to provide for the issue of some children only, unless because of the other children leaving issue, having themselves interests enabling them to provide for their issue.

We have here, as above stated, in addition to other ambiguities, two trusts, each of which is expressed to take effect only should the parents die "without leaving any issue." Such a limitation over was considered by Sir *John Leach*, in *Perfect* v. *Lord Curzon* (5 Madd. 442), sufficient to let in children dying before their parents, although the trusts for children were only to arise in case of there being a child living at the death of the surviving parent, or there being more than one child living at the death of the surviving parent, words more difficult to get over than the words in the present case. In *King* v. *Hake* (9 Ves. 438) Sir *William Grant* applied these cases to a still more difficult case, taking advantage of the omission

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Dorset (1), *Emperor* v. *Rolfe* (2), *Hope* v. *Lord Clifden* (3), *Currie* v. *Larkins* (4), and the other cases of that class, is not fairly applicable. The rule in those cases was introduced to prevent the children of a child of the marriage being left entirely without a provision in consequence of the death of that child during the

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of the word "such" in the limitation over. He thus laid hold of a single word as sufficient to let in children not otherwise entitled. He referred to that case in *Howgrave* v. *Cartier* (3 V. & B. 79), in which case he held it to be unnecessary for the children to survive their parents. In *Whatford* v. *Moore* (3 My. & Cr. 270) Lord *Cottenham* held the principle of the cases referred to to be inapplicable to the case before him. He said that in a case of doubtful construction the Court leans to that which will include children dying before their parents as most convenient, and most likely to have been the intention of the parties. He said it might be thought the Court had gone the full length that was justifiable to attain that object, but no case had gone so far as to do violence to the words, if no other part of the instrument were found inconsistent with them. He said the only reasonable course was to adopt the rule of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so, but if not, to give effect to the plain meaning of the words used. In that case there were many circumstances excluding the application of the principle in question, and the various indications of intention existing in the present case to include all issue were wanting. The Lord Chancellor did not mean to overrule the many earlier decisions in which the principle had been applied. As observed by Vice-Chancellor *Wood*, in *Swallow* v. *Binns* (1 K. & J. 417), although the word "such" was once or twice dropped in *Whatford* v. *Moore*, yet it continually recurred in such a manner as to induce Lord *Cottenham* to say it was perfectly clear that there was no room left for supposing any possible waiver or uncertainty of intention on the part of the settlor with reference to the exclusion of children who predeceased their parents. Vice-Chancellor *Wood*, in *Swallow* v. *Binns*, held that a limitation over in case all such of *E.'s* children as were sons should die under twenty-one, and all such of them as were daughters under that age without having married, was sufficient, even in a post-nuptial settlement, to let in predeceasing children, although the trust was "In trust for all *E.'s* children which might be living at his decease," words much more difficult to manage than the trusts for children in the present case. Upon the whole, I consider this a case in which, having regard to the authorities and the principle to be applied, it was not necessary for a child to survive the parents in order to be entitled to share. Adopting language used by Sir *William Grant*, in *Howgrave* v. *Cartier*, I cannot say that from the whole of the instrument there is a clear, definite, and unambiguous intention to be collected to exclude all children not surviving their parents; and the authorities I have referred to, I think, require me to declare that the deceased son, although he did not survive his parents, was entitled to share.

(1) 3 Bro. C. C. 569.
(2) 1 Ves. Sen. 208.
(3) 6 Ves. 499.
(4) 4 D. J. & S. 245.

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lifetime of the parents, a result against which the Court struggles, as it is inconvenient, and cannot have been intended. Here, upon the fair construction of the instrument, a provision is made for the issue of a child who dies in the lifetime of the parents. Upon the natural construction of the instrument, no child of the marriage can take who does not survive the parents: *Wingrave* v. *Palgrave* (1); *In re Watson's Trusts* (2); *Bythesea* v. *Bythesea* (3); *Kimberley* v. *Tew* (4); *Farrer* v. *Barker* (5). In *Powis* v. *Burdett* (6) the natural meaning of the words was got over by reason of the power of advancement, but there is no such clause here. In *Howgrave* v. *Cartier* (7) the instrument was incorrect and contradictory. *Treharne* v. *Layton* (8) was a case where, in the first instance, there was a clearly vested gift, and the only question was whether the gift over divested it. The only effect of applying the rule of *Woodcock* v. *Duke of Dorset* (9) here, is to take away half the fund from the issue of the marriage and give it to the father. Moreover, the rule is not a rule of law but a rule of construction, and cannot be applied where the words of the limitation are clear the other way, and there is nothing in the other parts of the instrument to vary them: *Whatford* v. *Moore* (10); *Howgrave* v. *Cartier*; *Swallow* v. *Binns* (11); *Grey* v. *Pearson* (12); *Roddy* v. *Fitzgerald* (13); *Abbott* v. *Middleton* (14).

Mr. *Morgan*, Q.C., and Mr. *Macnaghten*, for the representative of the deceased son:—

Considering the case apart from *Woodcock* v. *Duke of Dorset*, we contend that the settlement does not make any provision for the children of a child who dies in the lifetime of the parents. The proviso is in case any "of such issue as aforesaid should die." This, in its natural and grammatical sense, means the issue who had been spoken of as objects of gift. It will be said that this makes the proviso unmeaning, but that is not so, it has an effect

(1) 1 P. Wms. 401.
(2) Law Rep. 10 Eq. 36.
(3) 23 L. J. (Ch.) 1004.
(4) 4 D. & War. 139, 150.
(5) 9 Hare, 737.
(6) 9 Ves. 428.
(7) 3 V. & B. 79.
(8) Law Rep. 10 Q. B. 459.
(9) 3 Bro. C. C. 569.
(10) 3 My. & Cr. 270.
(11) 1 K. & J. 417.
(12) 6 H. L. C. 61, 106.
(13) Ibid. 823, 876.
(14) 7 H. L. C. 68, 113, 114.

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in the case of a daughter who marries without consent, and dies under twenty-one, leaving issue.

[The LORD JUSTICE MELLISH:—It is hard to suppose that the settlors intended to provide for such a contingency as that.]

The form of the ultimate gift over is inconsistent with the view that the proviso applies to the issue of children who do not survive the settlors, for it is to take effect if the settlors do not leave any child surviving them; the word "issue" in the first part of the clause denoting only the immediate issue. Again, the gift over to the issue of a child dying is a gift of the "share" of that child, shewing that the child was an object of gift and had a share. The Appellant's construction makes it impossible for a son who attains twenty-one in the lifetime of his parents to make a marriage settlement. Some of the cases refer to *Woodcock* v. *Duke of Dorset* (1) in terms implying that it went too far, but Lord *St. Leonards*, in *Clayton* v. *Earl of Glengall* (2), treats it as part of the settled law of the Court.

SIR W. M. JAMES, L.J.:—

The principle according to which, in my opinion, this case ought to be decided, has been well expressed by Lord *Cottenham*, in *Whatford* v. *Moore* (3): "In a case of doubtful construction upon the whole instrument, the Court leans to that which will include children so dying" (*i. e.*, dying in the lifetime of the parents after attaining twenty-one) "as most convenient, and most likely to have been the intention of the parties. It may be thought that Courts have gone the full length that is justifiable in order to attain this object, but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them. The rule, as laid down by Sir *W. Grant*, in *Howgrave* v. *Cartier* (4), does not carry it further, and he decided that case upon some inaccuracies in the provisions, and particularly upon there being a power of appointment which was inconsistent with the contingency continuing. In this case there is no such power of appointment, and, beyond all doubt, a contingency must continue during the

(1) 3 Bro. C. C. 569.
(2) 1 D. & War. 19.
(3) 3 My. & Cr. 270.
(4) 3 V. & B. 79.

life of the mother. *Woodcock* v. *Duke of Dorset* (1) has always been considered as carrying the doctrine to its utmost limits. It appears that that decision was much influenced by the consideration, that if all the children had died before the surviving parent, the fund would have gone back to the father of the intended wife. In this case it is quite clear that if all the younger children had died before the father, no portions would have been raiseable, which affords a strong argument against any portion being raiseable for any one younger child dying before that time. The cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule which has been generally recognised, of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but, if not, to give effect to the plain meaning of the words used."

According to this rule, it is the duty of the Court in a case of this nature to give effect to the words confining the gift to children who survive their parents, unless the instrument contains something which will give support to a construction including all the children who attain twenty-one. Apparently no case has occurred on a settlement framed like this, making a distinct provision, whether complete or not, for the issue of children of the marriage, nor on a settlement which, like this, absolutely precludes what the Courts have tried to find, a power for a child of the marriage who attains twenty-one, and marries in the lifetime of the parents, to make a settlement which will not be defeated by the settlor's dying in their lifetime. On any construction of this settlement, there was, as Lord *Cottenham* says, in *Whatford* v. *Moore* (2), a contingency which must endure throughout the lives of the parents, for the share of a child who dies in the lifetime of the parents leaving children is given over to those children. This takes the present case out of the category of those cases which proceed on the ground that there is an implied agreement to provide for all the issue of the marriage, and that it is inconsistent with such agreement that the children of a child who dies during the lifetime of the parents should be cut out of what would naturally come to him and his family. Here there is a recital of an

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(1) 3 Bro. C. C. 569. (2) 3 My. & Cr. 270.

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intention to provide for the issue of the marriage, and taking the words of the settlement according to their natural meaning, a provision is made for remoter issue as well as for children. We first have a gift of the income to the husband for life, then to the wife for life, and after the decease of the survivor, in case they leave any issue (*i. e.* child or children) who being a daughter or daughters live to be married or to attain the age of twenty-one years, or being a son or sons live to attain that age, then the fund is given among such issue, share and share alike. Then, as if for the purpose of preventing the necessity of applying the doctrine of *Woodcock* v. *Duke of Dorset* (1), we have a provision that if any of such issue should happen to die before respectively becoming entitled to and actually receiving their portions, leaving lawful issue, then such last-mentioned issue shall take his, her, or their father's or mother's share or shares equally between or amongst them, the same to be paid, assigned, or transferred to such last-mentioned issue at the same time and times respectively, and the interest thereof to be in the meantime applied for the benefit of such last-mentioned issue or respective issues, at such time or times as thereinbefore limited and declared concerning the original trust moneys and the immediate issue of the marriage. This is the way in which a provision is made for remoter issue of the marriage. It is true that if we construe the words "such issue" in their strict sense, they apply only to children of the marriage who survive their parents, and the issue of children who die in the lifetime of the parents are excluded. But ought that strict construction to be adopted? It is a singular argument, that we ought to adopt a construction which makes a gap in order that we may have an opportunity of applying a doctrine which furnishes a particular way of filling up such a gap when it exists. Suppose no such case as *Woodcock* v. *Duke of Dorset* had ever been decided, any Court would have construed this provision as intended to meet the case of a child dying and leaving issue before becoming entitled; and the argument of the Respondents asks us to apply an artificial rule to fill up a gap created by ourselves. Then it is urged that the language of the gift over is inconsistent with the view contended for by the Appellant. I do not think that in cases of this

(1) 3 Bro. C. C. 569.

description much importance ought in general to be attached to the precise form of words introducing a gift over, for the gift over is not in general intended to operate by way of defeasance but only to dispose of what was left undisposed of by the prior limitations. If we consider the contingencies, the gift over seems reasonably clear, and to amount in substance to this, that if no one becomes absolutely entitled under the previous trusts, the funds are to go in a certain specified way. The instrument, as it stands, seems, to my mind, fairly and plainly to carry into effect the intention of the settlors, which I take to have been, that no child of the marriage who died in the lifetime of the parents should take a share, but that if he left children, his children should take in his stead. To apply the doctrine of *Woodcock* v. *Duke of Dorset* (1) to this case would be extending it to a case quite outside its principle.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There are two questions in the case, first whether, giving to the word "leaving" its natural meaning, the proviso makes a provision for the issue of children of the marriage who die in the lifetime of their parents; and, secondly, whether, if so, the doctrine of *Woodcock* v. *Duke of Dorset* applies.

As regards the first point, looking at the language of the settlement without regard to authority, the case presents no great difficulty. The original gift, taking the natural meaning of its terms, is a gift to such children of the marriage as survive their parents, and being sons attain twenty-one, or being daughters attain that age or marry. The words "such issue as aforesaid," in the introduction of the proviso, would *primâ facie* mean children who survive their parents and attain twenty-one or marry; but the words cannot have that meaning, for children answering those conditions could not die before becoming entitled to receive their shares. It is clear, then, that the meaning is that if those who would upon surviving their parents and attaining twenty-one become entitled die without becoming so entitled and leave issue, the issue are to take the shares to which their respective parents would have become entitled if they had fulfilled those conditions.

(1) 3 Bro. C. C. 569.

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This is not a strained construction but a natural one; it is useless to urge that the other construction of "such issue as aforesaid" must be adopted because it is grammatical, when it makes the proviso wholly insensible. So, again, the word "share" in the proviso must be taken to mean the share to which the child who dies leaving issue would have become entitled if he had lived long enough. We then come to the gift over, and in this clause I think that "issue" is throughout to be construed in its proper legal sense so as to include grandchildren, and that no argument can be drawn from this clause against construing the proviso as operating in favour of the issue of children of the marriage who die in the lifetime of the parents.

This being so, I am of opinion that the doctrine of *Woodcock* v. *Duke of Dorset* (1) does not apply, for that is a rule by which the Court departs from the natural meaning of the words used, in order to include issue for whom no provision is made, and for whom it is presumed that the settlor must have intended to provide. The construction of the Appellant makes the settlement quite as reasonable as that of the Respondent, and in fact more so. The only difference between them being that according to the construction contended for by the Appellant, a child who dies without issue in the lifetime of the parents cannot take a share. I see nothing extraordinary in that in a settlement which does not contain any power of appointment. It is said that this construction prevents a child who attains twenty-one and marries from making any provision for his wife. The same result would follow on the Respondent's construction, with this exception, that according to that construction the child might make a provision in favour of his wife which would be effectual if he left no issue. According to neither view could an effectual marriage settlement be made. The settlement contains no recital from which we can infer an intention to provide for the husbands and wives of the children, and I see no reason why it should not be construed according to the natural meaning of its plain words.

Solicitors: Messrs. *Burton, Yeates, & Hart;* Messrs. *Le Riche & Son.*

(1) 3 Bro. C. C. 569.

BRITISH MUTUAL INVESTMENT COMPANY *v.* SMART.

L. JJ. 1875 July 7, 8.

[1874 B. 51.]

Real Assets—Alienation by Devisee—Equitable Mortgage—Priority over Creditor of Testator—Trustee—Breach of Trust—Charge on Trustee's beneficial Interest.

An equitable deposit with memorandum of charge by a devisee is an alienation which *pro tanto* prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. 4, c. 104.

Where a person seised in trust for himself and another in common in fee retains the entire rents, the debt arising in favour of the co-tenant will not be charged, on the principle of *Morris* v. *Livie* (1), on the trustee's beneficial interest as against a purchaser without notice from him.

A testator, being seised of a house in trust for himself and *H.* as tenant in common in fee, made his will, by which he devised all his real estate to his wife in trust to buy herself an annuity, and subject thereto in trust for his two sons equally. The testator had received to his own use the whole of the rents of the house, and died indebted to *H.* in a considerable sum on account of her share. The two sons deposited the title-deeds of the house with the Plaintiffs, accompanied by a memorandum charging their interests in the house with a sum of money advanced by the Plaintiffs, who had no notice of *H.*'s interest. *H.* afterwards filed a bill against the real and personal representatives of the testator, in which she established her right to one moiety of the house, and obtained a decree charging the amount of rents due to her on the testator's moiety of the house.

Demurrer to bill by Plaintiffs to establish their priority over *H.* overruled.

The dictum in *Coope* v. *Cresswell* (2) followed.

Carter v. *Sanders* (3) disapproved.

Decision of *Hall*, V.C., reversed.

THIS was an appeal from a decision of Vice-Chancellor *Hall*, allowing a demurrer to the Plaintiffs' bill.

The Plaintiffs were the *British Mutual Investment Company, Limited*, and the statements of the bill were as follows :—

John Monkhouse, by his will, dated the 6th of February, 1809, and a codicil dated the 22nd of August, 1817, devised a freehold house in *Pall Mall* unto and to the use of *Robert Piper*, *Thomas Piper*, and *Henry Fauntleroy*, and their heirs, in trust for his daughter, *Ann Lydia Piper*, during her life, with remainder in trust for her husband, *Robert Piper*, during his life, and after the death of the survivor in trust for all their children equally, as tenants in common in fee.

(1) 1 Y. & C. Ch. 380. (2) Law Rep. 2 Ch. 112, 122.
(3) 2 Drew. 248.

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The testator died in September, 1818. *Robert Piper* died in 1839, and his wife, *Ann Lydia Piper*, died in 1856. At her death *Robert Monkhouse Piper* was supposed to be their only son, and he entered into sole possession of the freehold house in *Pall Mall*.

Thomas Piper survived his two co-trustees, and died in 1851, having by his will devised all his trust estates to *Robert Monkhouse Piper*, who was his nephew.

Robert Monkhouse Piper died in 1863, having by his will devised all his freehold estate to the use of his wife, *Mary Piper*, upon trust to receive thereout an annuity of £500 during his life, and subject thereto upon trust for her two children, *R. F. Piper* and *C. A. Piper*, equally. *Mary Piper* afterwards married *G. H. Brand*.

On the 3rd of September, 1872, *R. F. Piper* and *C. A. Piper* deposited the title-deeds of the house with the Plaintiffs, from whom they had borrowed a sum of £5000. The deposit was accompanied by the following memorandum:—

"To the *British Mutual Investment Company, Limited.*

"Whereas under and by virtue of the will of *Robert Monkhouse Piper*, deceased, we are entitled to the freehold of the premises known as No. 48, *Pall Mall, London:* Now in consideration of your discounting a promissory note for £5000 made by us, and payable at two months' date, we hereby charge our interest in the premises named with the payment of the said sum and interest at the rate of £15 per cent. per annum from the maturity of the said promissory note, and agree to execute such deed or deeds for securing the said moneys as you may prepare or require us to sign, and to pay your solicitors' charges for and in connection with the same.

"And we severally declare that we have not charged or in any manner incumbered or dealt with our interest in the premises No. 48, *Pall Mall*, upon which this memorandum constitutes a charge.

"Dated this 3rd day of September, 1872.

"*Robert F. Piper.*
"*Charles A. Piper.*"

R. F. Piper and *C. A. Piper* were afterwards adjudicated bankrupts, and *F. B. Smart* and *C. L. Nichols* were respectively appointed trustees of the estate.

In the year 1873 a bill was filed by *Martha Hooper* against *Smart, Nichols,* and Mr. and Mrs. *Brand,* claiming a moiety of the house in *Pall Mall,* on the ground that *Robert* and *Ann Lydia Piper* left not only a son, *R. Monkhouse Piper,* but a daughter, *Jane Mary Piper,* under whom the Plaintiff, *Martha Hooper,* derived title. By a decree in this suit of *Hooper* v. *Smart,* which was made on the 6th of July, 1874, it was declared that on the death of *Ann Lydia Piper, Martha Hooper* became equitably entitled as tenant in fee simple in possession to an undivided moiety of the house in *Pall Mall,* and that the Defendants *G. H. Brand* and *Mary Brand,* in right of *Mary Brand,* were trustees of such moiety for *Martha Hooper* and her husband; and also that the estate of *R. Monkhouse Piper,* deceased, was liable to account to *Martha Hooper* and her husband for one moiety of the rents and profits of the said house received by *R. Monkhouse Piper* from the date of the death of *Ann Lydia Piper* to the date of the death of *R. Monkhouse Piper,* and also to pay the costs of *Martha Hooper* and her husband, and of *G. H. Brand* and *Mary Brand;* and it was also declared that *Martha Hooper* and her husband were entitled to a charge on the other moiety of the house, to which *R. Monkhouse Piper* was beneficially entitled, in respect of the amounts due to them from his estate when ascertained(3)

The Plaintiffs then instituted the present suit, praying for a declaration that the security created by the deposit and memorandum of the 3rd of September, 1872, had priority as to the moiety of *R. Monkhouse Piper* over the charge of *Martha Hooper* and her husband and of Mr. and Mrs. *Brand,* under the decree in *Hooper* v. *Smart,* and for enforcing their security in the usual manner.

To this bill the Defendants *Martha Hooper* and her husband demurred.

The Vice-Chancellor considered that the case was governed by *Carter* v. *Sanders* (1), and accordingly allowed the demurrer (2).

(1) 2 Drew. 248.

(2) 1875. June 5. WM(1875) 118

SIR CHARLES HALL, V.C.:—

The question in this case has been very ably argued, and I have had all the assistance I possibly could have from counsel in the course of the arguments before me.

In my view this case must be taken to be governed by the case of *Carter* v.

(3) See Hooper v. Smart L.R. 18 Eq. 682. V.C.H. on first hearing of suit L.R. 10 Ch. D. 614. V.C.H.

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From this decision the Plaintiffs appealed.

Mr. *Dickinson*, Q.C., and Mr. *Phear*, for the Appellants:—

The claim of the Respondent is a simple contract debt from the

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Sanders (2 Drew. 248). Whether that case was rightly decided or not is not for me to say. It was decided by a very experienced, able, and careful Judge, who, I consider, has determined the question now before me. It is not merely that he has decided the case, but it has, as I consider, been the received law of real property from the time of that decision up to the present time, and has never been denied or questioned; and I cannot but think and believe that there are titles depending upon the soundness of that decision which would be greatly disturbed if I were to take a different view of the law and express a different opinion. There may very well have been, and probably have been, sales made under the decree of the Court founded on the correctness of that decision.

It is said that the reasoning of the learned Vice-Chancellor is unsatisfactory; that there are observations in *Coope* v. *Cresswell* (Law Rep. 2 Ch. 112, 122) by Lord *Chelmsford* which, if you would follow out the matter by close reasoning, would lead to the conclusion that the Vice-Chancellor was wrong, that there is no substantial distinction between a conveyance of an equitable estate and a security created by deposit accompanied by a memorandum of charge in the ordinary way. For the purposes of my judgment, I consider it sufficient to say that the Vice-Chancellor was of that opinion, the case before him being that of a deposit accompanied by a memorandum; because, although that is not stated in the marginal note, one of the two advances, at all events, was accompanied by a memorandum of deposit. We have not got the terms of the memorandum, and it might be said that something might possibly turn on the terms of the memorandum. But nothing did turn on them apparently, according to the decision, because the Vice-Chancellor did not consider it depended in any way on the terms of the memorandum. I do not know whether or not in that case the memorandum went on and expressed in terms that there was in the meantime a charge. I refer to that because it is so in this particular case, and the memorandum says the property is charged. That would be a very thin and fine distinction, which, in the absence of authority, I should not be disposed to regard. It would be for a higher tribunal than this to make that a distinction. As I have said, that being laid down as the law by the Vice-Chancellor in the year 1854, now for a period of twenty years property has been dealt with apparently on the footing of it. Mr. *Bagshawe* has referred to one very able real-property lawyer, who lays down that to be the rule without qualification. It is laid down in like manner in a work I think ten years old now—I refer to Mr. *Joshua Williams*' work on Real Assets. We have therefore got that stated to be the law. I believe that it has been acted upon by real-property lawyers, and that this is a case in which the views and opinions of conveyancers may reasonably and properly, and should be had regard to, seeing, as I have said, that probably a different view of the law would disturb titles which have been accepted on the

estate of *Robert Monkhouse Piper*. He was not a trustee of the rents for his co-tenant; it is simply the case of one tenant in common not having accounted for the rents to his co-tenant.

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faith of that being the law. If, however, the law was incorrectly stated at that time by the learned Vice-Chancellor, I certainly should not presume, if I had an opinion different from it, as to which I say nothing, to exercise my own judgment and opinion upon it; but I myself must follow it.

There is another point relating to the memorandum of charge raised by Mr. *Bagshawe*, as to which it is not necessary for me to express an opinion. The point is, whether, upon the true construction of the memorandum, it was intended to charge the fee simple in possession free from all incumbrances, or whether, having regard to the terms of it, it must be taken to have been intended to charge only what the actual interest was, although accompanied by a representation of the interest being one which was different from what it was, if the property in question could be considered as being subject in any sense, for any purpose, to a charge of debts. Upon that there may be a question. If Mr. *Bagshawe* is right upon that, it would be another answer to the Plaintiffs' claim; but I give no opinion whatever upon that. But then it is said, if that be so, there is no debt in this case. I cannot accept that view as correct. The person who is alleged to be the debtor was a person in whom the property had become vested by devise from the surviving trustee, in whom the property was vested in trust as to one moiety for Mrs. *Hooper*. He remained in possession of the entirety of the property, having the legal estate as to a moiety in trust for Mrs. *Hooper*; Mrs. *Hooper* being the *cestui que trust*, he being the owner of the legal estate as devisee of trust estates of the surviving trustee. He put the whole of the rents and profits of the entirety of the estate, being the beneficial owner of one moiety, into his own pocket, and did not account for a moiety of those to the *cestui que trust*, Mrs. *Hooper*. In that state of things, I consider, having regard to the law of this case, that there would be a receipt of those rents by him as trustee on behalf of his *cestui que trust* which would prevent the application of the *Statute of Limitations* to the case; and if that were so, there would equally be no bar as against his assets, whatever they might be, personal or real, as from the time of his death. As to this, I refer upon both points to the case of *Obee* v. *Bishop* (1 D. F. &. J. 137), which was referred to, followed and approved by Vice-Chancellor *Giffard* in *Brittlebank* v. *Goodwin* (Law Rep. 5 Eq. 545); and I would also refer to *Woodhouse* v. *Woodhouse* (Law Rep. 8 Eq. 514), before Vice-Chancellor *Stuart*, as bearing on the general question as to whether the statute would run under such a state of circumstances as this.

Well, then, if there was a debt, as I say there was, and if the statute is out of the question, then the creditor having the claim made a claim to the moiety of the estate, and at the same time sought to recover against the representatives of the debtor the rents and profits which had been received and not properly accounted for. That suit was apparently a suit framed in the ordinary way. There had been a prior administration suit, in which the claim to these rents and profits might have

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Under these circumstances we contend that the claim of the Appellants, as *bonâ fide* equitable alienees of the assets of the debtor, is a good bar under the statutes. The result of the *Statute of Fraudulent Devises* (3 & 4 Wm. & M. c. 14) and the subsequent statutes (47 Geo. 3, c. 74; 11 Geo. 4 & 1 Will. 4, c. 47; and 3 & 4 Will. 4, c. 104), which have by various steps granted the same remedies to simple contract creditors as to specialty creditors, is that the liability of the lessee or devisee is only personal, and that the creditor cannot follow the real assets into the hands of a *bonâ fide* alienee: *Richardson* v. *Horton* (1); *Morley* v. *Morley* (2); *Whitworth* v. *Gaugain* (3); *Ex parte Baine* (4). The only question in this case is, whether this applies to an equitable

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been brought in, but it was not brought in; and there was the question about the title to the land itself, the moiety in question; and the whole thing was brought forward in one suit, and the claim was established. The Defendants to that suit were the proper Defendants according to the practice of the Court, even having regard to this title or interest which was vested in the persons claiming under this deposit. I take it they were the right parties in point of form to the suit. Although, no doubt, this question which has been discussed before me was not disposed of in that suit, and if I had come to a different conclusion to what I have done on this main question, what took place there would not preclude the Plaintiffs here having that question disposed of, yet it was a claim against the representatives and a claim made against the assets, this property being undoubted assets subject to this question of alienation. That being so, the Court dealt with this moiety as assets, and having declared the title to the moiety of the land itself, went on as against the other moiety of the estate, and gave an account of rents and profits, and a charge against those assets. It followed upon that, as incidental to and consequent upon the other part of the decree, that the costs should be provided for, and I cannot say that the costs are to be distinguished so that the charge of rents might be good against this deposit, but the charge of costs not good. The argument is, that the substance of the case related to the moiety itself, and not to a claim against assets. That is a very ingenious and refined distinction, but I cannot have regard to it and split this decree into two parts so as treat those persons who have asserted this claim as devisees as being in any way prior to the claim under that decree.

That being so, it seems to me that these demurring parties must, in respect of the only interest as to which they are made parties to the suit, be considered as prior in interest to the Plaintiffs in this suit, prior in respect of their charge on the moiety in question as assets; and having that, they are not proper parties to a suit of this description, and therefore the demurrer will be allowed.

(1) 7 Beav. 112.
(2) 5 D. M. & G. 610.
(3) Cr. & Ph. 325.
(4) 1 M. D. & D. 492.

mortgage by deposit of title-deeds. The Vice-Chancellor held that he was bound by the decision of Vice-Chancellor *Kindersley* in *Carter* v. *Sanders* (1), where it was held that a deposit of title-deeds by the heir did not defeat the right of the creditors of the ancestor. But there were several other questions in that case, and this point does not seem to have been much considered. On the other hand, in *Coope* v. *Cresswell* (2) Lord *Chelmsford* expresses a contrary opinion, although it was not necessary to decide the point. This is a stronger case than a deposit of title-deeds by an heir or devisee who has the legal estate, for here the interest of the devisees who deposited the deeds was itself only equitable; and this Court will deal with an equitable alienation of an equitable estate in the same way as with a legal alienation of a legal estate.

If the Defendants have any claim, they cannot have the whole of their debts paid out of their asset. A great part of the assets have been already distributed, in which distribution they might have participated, and their claim must be reduced by a sum proportioned to that amount: *Gillespie* v. *Alexander* (3); *Greig* v. *Somerville* (4).

Mr. *Bagshawe*, Q.C., and Mr. *Wiglesworth*, for the Defendants:—

The case is governed by *Carter* v. *Sanders*. That authority was not formally overruled in *Coope* v. *Cresswell*, and it has been treated as binding law by all the text writers since: *Davidson's* Conveyancing (5), *Dart's* Vendors and Purchasers (6), and *Williams* on Real Estate (7). Our title depends upon the 3 & 4 Will. 4, c. 104, which makes the land "assets to be administered in Courts of Equity" for payment of all debts. That must mean that it is to be considered a fund specifically set apart for the creditors. The creditors may get a receiver appointed, and take the land out of the hands of the heir or devisee. The creditor has a double right; he can proceed personally against the heir or devisee, and

(1) 2 Drew. 248.
(2) Law Rep. 2 Ch. 112, 122.
(3) 3 Russ. 130.
(4) 1 Russ. & My. 338.
(5) Vol. ii. p. 994.
(6) 4th Ed. p. 571.
(7) Page 25.

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he can also proceed against the land, and this right to the land has always been treated as a charge: *Hamer's Devisees' Case* (1); *Kinderley* v. *Jervis* (2); *Ridgway* v. *Newstead* (3). The equitable mortgagee must therefore take subject to all the equities of the devisees. But we also contend that this is not merely a simple contract debt; our claim arises out of a breach of trust by the testator. He held the legal estate in trust for *Martha Hooper*, and no one claiming through him can take any benefit till the breach of trust is made good: *Morris* v. *Livie* (4); *Barnett* v. *Sheffield* (5).

SIR W. M. JAMES, L.J.:—

In this case I am of opinion that the order of the Vice-Chancellor, which does not appear, as far as I can gather, to have been altogether in accordance with his own opinion on the subject, ought to be discharged and the demurrer overruled. The Vice-Chancellor proceeded entirely upon the case of *Carter* v. *Sanders* (6), a decision of Vice-Chancellor *Kindersley* no doubt entitled to great respect, as every decision of that learned Judge is. But that decision of Vice-Chancellor *Kindersley* was pronounced by him certainly in very few words and without reference to the case of *Ex parte Baine* (7), which had been decided previously by a Court of co-ordinate jurisdiction, and a Court very much in the habit of dealing with cases of that kind—cases of equitable charge—the Court of Bankruptcy, and without, apparently, giving very full consideration to that part of the case, that being the part which he disposes of in the fewest words.

In this case the Vice-Chancellor *Hall* says, not only that he takes that case as an authority for him, which no doubt it was, but that, as it had found its way into the text-books, he might possibly be disturbing titles and disturbing the holdings of property if he were now to differ from and overrule that decision. I am bound to say I have been considering the thing all through the argument, and I cannot conceive the possibility of a case of any disturbance of

(1) 2 D. M. & G. 366.
(2) 22 Beav. 1. 2 Jur. N. S. 603
(3) 3 D. F. & J. 474. 7 Jur. N. S. 451
(4) 1 Y. & C. Ch. 380.
(5) 1 D. M. & G. 371.
(6) 2 Drew. 248.
(7) 1 M. D. & D. 492.

title arising from the overruling of that case. I can conceive the case of persons not being able to make titles as easily and satisfactorily as they otherwise could by reason of that case being in the way; but I cannot conceive any person having ever obtained a title based on that decision. Therefore I think we are not in any way governed by that case, or to be deterred from the independent determination of the present case by any consideration of the time that has elapsed since that decision was pronounced by Vice-Chancellor *Kindersley* without its having been questioned, except, indeed, by a very strong and clear expression of opinion, certainly not necessary for the decision of the case then before the Lord Chancellor, upon the very same point in *Coope* v. *Cresswell* (1). Therefore, being free from any difficulty arising from the length of time, we have to consider this case upon principle and authority such as there is upon the question.

Now upon principle it seems to me scarcely to admit of much doubt. The right of the Respondents to follow the assets of *Robert Monkhouse Piper* is entirely an equitable right. It is a right to be enforced in a Court of Equity, and is given by statute to simple contract creditors to be enforced in Equity, in exactly the same manner as under the old law specialty creditors were entitled to pursue the real assets of their deceased debtors in a Court of Equity, the remedy now given to the simple contract creditor being the equitable remedy which this Court gave for convenience in some cases, for more than convenience in other cases, to the specialty creditor. Now beyond all question the Court of Equity, in dealing with the real assets of a deceased debtor, never considered whether those assets were legal or equitable, but dealt with the substance of the matter. Then when it dealt with the real assets they were always subject to the proviso found in the statute of 3 & 4 Wm. & M. c. 14, and afterwards repeated in 11 Geo. 4 & 1 Will. 4. c. 47, that is to say, that the alienation of the assets by the heir or devisee was to prevent the creditor from following those assets into the hands of the alienee, he being a *bonâ fide* alienee. As far as the law was concerned, the right at law was prevented where there was a legal alienation by that alienation. It appears to me, following out the analogy and extending

(1) Law Rep. 2 Ch. 122.

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the remedy against equitable estates, that this Court ought to treat an equitable alienation as having exactly the same effect in this Court as a legal alienation would have. To my mind the alienation that is made in this case by an instrument not under seal, an express charge upon the estate, which is an alienation to the extent of the charge, is as complete for all purposes in this Court as if it had been made in due form by an instrument indented at the top and sealed at the bottom. Those forms are not forms which this Court has ever been in the habit of considering essential in dealing with property. The property is assets to be administered by this Court. There is that which in this Court is as complete an alienation of it, as between the alienee and alienor, as if it had been made under seal, and there is no question of either party having or obtaining a legal estate as purchaser for valuable consideration without notice. No question of that kind arises, no legal estate intervenes here. It simply is that the one man has a right to have an equitable execution against the estate of his debtor, in the same way as another creditor would have had a right to a legal execution. Then another creditor says, "Before you applied for equitable execution, I had obtained an equitable alienation." In my opinion that equitable alienation takes precedence of the equitable execution which the man was entitled to have by a suit in this Court. It appears to me that the Plaintiff was, therefore, right in saying that he, the equitable alienee, has priority over the equitable judgment creditor, for that is really what it comes to. That is the first point.

Then it is said there is a difference in this case by reason of this: that the claim has arisen out of a breach of trust, and that the deceased debtor who committed the breach of trust had got a trust estate, and could take no part of the trust estate till he had paid everything to his *cestui que trust;* but in substance it was a simple contract debt. When the trust estate, by the operation of the devise, vested in *Robert Monkhouse Piper*, he being the *cestui que trust* as tenant in common of part of the premises, the legal estate and the equitable estate became vested in him. No doubt he had a dry legal estate as trustee only, and it was a mere dry legal estate, for there was no duty to perform as trustee for the other tenant in common. They are in substance and in fact tenants in

common, one having the legal and equitable estate, the other having only the equitable estate, and it was neither more nor less than a receipt by one tenant in common of the rents and profits of the two shares of the two tenants in common.

I am, therefore, of opinion it was simply a debt. Under the circumstances of course it was a receipt by a trustee of that which belonged to another man, but after all it was nothing but a debt, and it must be treated on exactly the same principle as any other debt due from a deceased person would be treated, and therefore that can make no difference in the order that ought to be pronounced.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I entirely agree that we are not precluded by the authorities, and particularly by the case before Vice-Chancellor *Kindersley*, from considering and from determining for ourselves what is the proper decision to be come to on this no doubt very important point which is raised before us.

I think it is desirable to consider, in the first place, what is the nature of the liability of an heir or a devisee for the debts of the ancestor or of the devisor. Originally, by the common law, an action of debt could be brought against the heir upon a bond or a covenant by the ancestor which was expressed in terms to bind the heir. Then he could plead to that action that he had received nothing by descent, or that he had parted with everything that he had received by descent before the action was brought, and that was a perfect defence. But if he had no defence, then judgment was obtained against him, and then afterwards, under the *Statute of Westminster*, the execution could go against the lands in the hands of the heir. Therefore certainly it does appear to me that upon principle such a liability did not constitute a charge on the land until the judgment was actually obtained; just as in the case of a debt *inter vivos*, a man's lands were not charged with his ordinary debts until a judgment was obtained, but a judgment was a charge on the land subject to its being registered; and if an equitable mortgage were made prior to obtaining such a judgment, the Court of Equity protected the lands against the subsequent judgment and execution. And although it does not appear

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that there is any authority on the point, I should have supposed upon principle, that even in the case of a debt which bound the heir at common law, a Court of Equity, inasmuch as there was no charge on the land until the judgment was actually obtained against the heir, would have protected the equitable mortgagee from the heir against such a liability and execution. In fact I cannot see why a man should be more liable in respect of the debts of his ancestor, *quâ* land, than he is liable in respect of his own debts.

That being so, then the statute of *William* and *Mary* made a variety of alterations. In the first place, it was enacted that the heir was not to have a complete defence who had parted with his land, but there might be replication that he had received the value, and then the value might be recovered from him. But that was accompanied by a proviso that the execution should not extend to the lands which were aliened, still keeping up the principle that there was no actual charge until the judgment was obtained. When by the further statute of the 11 Geo. 4 & 1 Will. 4 the liability was still further extended, the same principle was carried out, and it was provided that in all cases where the heir-at-law would be liable to pay the debts or perform the covenants of his ancestor with regard to any lands, tenements, or hereditaments descended to him, and should alien or make over the same before any action brought, then the heir-at-law was to be answerable for the debt, but the lands *bonâ fide* aliened before action brought were not to be liable to such execution. Then followed the 3 & 4 Will. 4, c. 104, which simply says that all the lands of which a man was seised in fee simple shall be equitable assets for the payment of his debts, and shall be liable in the same manner as the lands were liable for the debts for which the heir was bound. That being so, it appears to me the same principle is carried out all through, and that there is no actual charge until either a judgment is obtained at law or a decree is obtained in equity; and therefore upon principle, even if a devisee had the legal estate devised to him, still the Court of Equity would protect an equitable mortgagee from him. Nor do I think there is any difference between an equitable mortgage which proves to be an actual assignment, and an equi-

table mortgage by deposit of title-deeds with a written charge. I think it would be very absurd to make any distinction between the two.

But I quite agree with what the Lord Justice has said, that it is not really necessary for us to decide that point in this case, or to go to that extent, because here the Defendants themselves claim merely an equitable right, and the persons who deposited the deed and the mortgagors themselves have only an equitable right. Applying the 6th section of 11 Geo. 4 & 1 Will. 4, c. 47, to that case, I do not see how it is possible to hold that a Court of Equity will extend the charge of lands, tenements, and hereditaments to equitable lands, tenements, and hereditaments, and then at the same time exclude the proviso, that if that equitable interest has been *bonâ fide* parted with before action brought, that alienation shall prevail. I also think that this is the most desirable conclusion to come to, because the simple consequence of the other decision would be that at no time can a devisee or heir-at-law borrow money on equitable mortgage, and in every case where he borrows money on equitable mortgage, if a mortgagee wishes to be safe, he will have to inquire whether there were any debts due from the devisor or ancestor, a fact which he had no possible means of inquiring into. He could not even rely on a decree, which there is in this case, declaring that these persons are equitably entitled. Therefore I entirely agree that this demurrer should be overruled. I might also add that I quite agree with what the Lord Justice has said on the other point, to which I do not think it necessary to add anything.

Solicitors for the Plaintiff: Messrs. *Barnard & Co.*

Solicitors for the Defendants: Messrs. *Ridsdale, Craddock, & Ridsdale.*

L. JJ.
1875
July 6.

UMFREVILLE *v.* JOHNSON.

[1873 U. 19.]

Misjoinder—Nuisance—Injunction—Form of Decree—Costs.

4 Ch D 683.
10 QBD 454, 57

Two owners of distinct properties joined as Plaintiffs in a suit to restrain a nuisance. The Court considered that a sufficient case of nuisance had, in the case of the first Plaintiff, not been made out, but in the case of the second Plaintiff had been made out. A decree was made for an injunction so far as regarded the second Plaintiff, and for the Defendant to pay him his costs; the bill as regarded the first Plaintiff to be dismissed, and the costs occasioned by the addition of the first Plaintiff to be deducted from the costs so to be paid by the Defendant.

Decree of *Bacon*, V.C., varied.

THE bill in this case was filed by Mr. *S. C. Umfreville* and the Rev. *F. Murray* against the owner of certain cement works.

Mr. *Umfreville* owned and resided at a very valuable estate called *Ingress Abbey*, near *Greenhithe*, about 1300 yards from the cement works. He had also a farm, which was very valuable for building purposes, and on which one villa had already been built, situated about 1100 yards from the cement works.

Mr. *Murray* was rector of *Stone*, near *Greenhithe*, and resided in the rectory, which was about 400 yards from the cement works. The Defendant had in 1873 begun to build large works for manufacturing cement, and alleged that the process on which he intended to make cement would not produce any nuisance, but the Plaintiffs alleged that the smoke and acids evolved in the process must be injurious; and the bill prayed that the Defendant might be restrained from building works for the manufacture of cement so as to occasion damage or annoyance to the Plaintiffs, or either of them, as owner of *Ingress Abbey* and rector of *Stone*.

Before the suit came to a hearing, the cement works were in operation, and a great deal of evidence was given on each side as to the amount of damage or annoyance to the two Plaintiffs.

The Vice-Chancellor *Bacon* granted an injunction generally (1).

The Defendant appealed.

(1) 1875. April 28.

SIR JAMES BACON, V.C., after expressing his opinion that the cement works would be injurious to the Plaintiffs, and that the Defendant must be restrained, continued:—

Mr. *Southgate*, Q.C., Mr. *Eddis*, Q.C., and Mr. *C. T. Simpson*, for the Defendant.

Mr. *Kay*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Jason Smith*, for the Plaintiffs.

THEIR LORDSHIPS came to the conclusion on the evidence that Mr. *Murray's* property would be substantially injured by the cement works, but that Mr. *Umfreville's* property, being more distant, would not be substantially injured, and their Lordships made the following decree:—

That the decree, dated 28th April, 1875, so far as the same affects the Plaintiff *Umfreville*, be reversed, and in lieu thereof, their Lordships being of opinion that the case of *Umfreville* as made out by the bill had failed, order that so much of the said bill as relates to *Umfreville* do stand dismissed as against the Defendant with costs, so far as they have been occasioned by reason of *Umfreville* being made a Plaintiff in this cause; and the Taxing Master is to reduce the costs by the said decree directed to be paid by the Defendant to the Plaintiffs by the amount whereby the Plaintiffs' costs were increased by reason of *Umfreville* being a Plaintiff in this cause, and from the said costs so reduced to deduct the proportion of costs payable by *Umfreville* to the Defendant, and also the sum of £20 after mentioned; but in other respects their Lordships did affirm the decree.

Order the £20 deposit to be paid to the Plaintiff *Murray*.

Solicitor for the Plaintiffs: Mr. *W. A. Plunkett.*
Solicitors for the Defendant: Messrs. *Harrison.*

I think there is no ground whatever to sustain the objection on the score of misjoinder. The interest of Mr. *Umfreville*, no doubt, is less than that of Mr. *Murray*, but Plaintiffs with a common interest may well join, and these Plaintiffs do complain of a common injury. No injustice can be done to the Defendant by the joining of the Plaintiffs. The evidence shews that the nuisance reaches to *Ingress Park*, though it is much less strong as to any injury that has been done there. But whether much or little, the injury does reach *Ingress Park*, Mr. *Umfreville* has as good a right to be protected as Mr. *Murray*, and I cannot think that there is any ground whatever for entertaining the objection which has been taken on the score of misjoinder.

And His Honour granted an injunction restraining the Defendant from erecting or building in or about the premises purchased by him any factory, kilns, furnaces, chimneys, or works for the manufacture of cement or chemicals, or from burning chalk or manufacturing cement or chemicals, or doing or suffering any other act or process to be carried on, in, or about the same, so as to cause or occasion a nuisance to the Plaintiffs, or either of them, as the owner of *Ingress Abbey*, or *Western Cross Farm*, or of the rectory of *Stone* respectively. The Defendant to pay the costs of the suit.

L. JJ.
1875
May 4, 5.

WOOD *v.* SAUNDERS.

[1873 W. 146.]

Easement—Change of Condition—Reasonable Use—Deed—General Words.

Where an easement to land has been granted, the use of that easement will be restricted to a reasonable use for the purpose of the land in the condition in which it was when the grant was made.

Decree of *Hall*, V.C., affirmed with a variation.

By an indenture of lease dated the 9th of June, 1870, *L. B. Knight Bruce*, and *H. Saunders* and his trustees, demised to *William Wood* the mansion and grounds near *Roehampton*, called the *Priory*, with the out-offices, gardens, and pleasure-grounds thereto belonging, containing 9A. 2R. 8P. or thereabouts; together with the free passage and running of water and soil in and to the existing cesspool, and in and through all the drains, sewers, and watercourses then constructed or thereafter to be constructed through the adjoining property of the said *L. B. Knight Bruce*, for the term of two years; and by the same indenture the lessee had the option of purchasing the premises for £10,000. The lessee exercised that option, and by an indenture dated the 21st of May, 1872, *L. B. Knight Bruce* and the trustee of a term granted and released unto *William Wood*, his heirs and assigns, all that messuage or mansion-house situate near *Roehampton*, in the parish of *Putney*, in the county of *Surrey*, called the *Priory*, being the hereditaments comprised in the thereinbefore stated lease of the 9th of June, 1870, with the out-offices, stables, buildings, gardens, and pleasure-grounds thereto belonging . . . . together with the free running of water and soil in and to the existing cesspool, and in and through all the drains, sewers, and watercourses constructed or thereafter to be constructed through the adjoining property of the said *L. B. Knight Bruce*, his heirs or assigns; and together with all buildings, ditches, ways, sewers, drains, watercourses, liberties, privileges, easements, and appurtenances whatsoever to the said messuage and premises belonging, or in anywise appertaining, to have and to hold the hereditaments and premises

thereby assured unto and to the use of *W. Wood*, his heirs and assigns for ever.

The only cesspool then existing on the adjoining property of *L. B. Knight Bruce* was an open ditch or moat, at a distance of 150 yards from the *Priory House*, and the only drains, sewers, or watercourses then constructed were drains which conveyed the water or soil from the *Priory House* to the above-mentioned ditch or moat.

At the dates of the lease and of the conveyance the *Priory House* was adapted for about twenty-five inmates, and a part only of the drainage from the house ran into the ditch or moat. In 1873, *W. Woods* altered the drains and made them all discharge into the ditch or moat. He also enlarged the house, and turned it into a lunatic asylum, in which nearly 150 persons were resident. The consequence was a large increase in the volume of night-soil and drainage, creating, as the Defendant *Saunders* alleged, an intolerable nuisance.

The Defendant *Saunders* appeared to be in possession of the cesspool in question and of the other lands of *L. B. Knight Bruce* under an agreement made with *L. B. Knight Bruce* for granting building leases, and had taken proceedings against the Plaintiff *Wood* in respect of the drains as for nuisance, and had, as the Plaintiff alleged, threatened to stop up the drains from the *Priory*.

The Plaintiff thereupon filed the bill in this suit to restrain the stopping up of the drains.

An injunction was granted on motion on the usual undertaking for damages. At the hearing of the suit the Vice-Chancellor *Hall* granted an injunction to restrain the Defendant from in any manner preventing the free use and passage of water and soil in and to the existing cesspool in the bill mentioned; but this order was only to protect the Plaintiff in the reasonable use of such cesspool to the extent to which the same was used prior to the date of the lease (1).

(1) 1875. March 2. SIR CHARLES HALL, V.C., expressed his opinion that the Plaintiff and the Defendant were each partly right and partly wrong. The question was as to the right conferred by the grant, and His Honour agreed with the Defendant that the right of the Plaintiff was not

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The Defendant appealed.

Mr. *Greene*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Warmington*, for the Defendant:—

The Plaintiff has enormously enlarged his house, he has also

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enlarged by the grant, but stood as it was at the date of the lease.

The question, therefore, to be determined was, what was the construction of the lease as granting a right during the continuance of that tenancy. It was argued on behalf of the Defendant that it was not to be construed, as an ordinary grant, most strongly as against the grantor, but that the onus lay upon the owner of the dominant tenement to shew that he had the right irrespective of any such rule of construction. But there was no authority cited in favour of that proposition as applicable to an easement created by grant. The cases referred to were cases of easements originating by user. No doubt that was ordinarily supposed to be under a grant, but there were not in those cases the terms of the grant to be construed, which, according to the ordinary rule, as between grantor and grantee were to be construed most strongly against the grantor.

There were, however, authorities which were clearly the other way. In *Williams* v. *James* (Law Rep. 2 C. P. 577, 582), Mr. Justice *Willes* expressly laid down the law to be so in the case of an easement, and the Vice-Chancellor *Malins*, in *United Land Company* v. *Great Eastern Railway Company* (Law Rep. 17 Eq. 158, 162), referring to the case of *South Metropolitan Cemetery Company* v. *Eden* (16 C. B. 42), laid down the same rule for construing grants of easements.

In this deed, however, there was quite enough to enable the Court to put a construction upon it without resorting to any such rule. His Honour then stated and commented on the words of the deeds, observing that in the conveyance there were the usual general words, which were almost always unmeaning, and sometimes contained a reference to easements which had been extinguished.

The Defendant had denied that this ditch was the cesspool in question, but in that on the evidence he had failed. He had also failed to prove the representations which he alleged had been made to him by the Plaintiff as to the use to be made of the *Priory*. There had been a stipulation in the lease that the buildings were not to be altered without the lessor's consent, which was never asked for. The right to the passage of soil was not an unrestricted right, but was at that time to some extent limited, as the mansion-house could not be enlarged without the consent of the lessor, and it must be held that the grant was on the same terms as the lease. The words as to the passage of soil could not be held to apply to any additions to the buildings. The Plaintiff, therefore, had not made out a right to the passage of soil and water from the building in its enlarged state. It had been said that the right must be construed with regard to the size of the pipe or ditch, but there was no authority for that proposition. In ascertaining the extent of the right of user of a road when the condition of the adjoining property has been altered, the fact that there was plenty of room

1 S.C. on appeal post 586

abolished his own cesspools and now sends his drainage directly down to the ditch. He must at all events be confined to such a use of the drains and cesspool as he had at the time of the grant: *Allan* v. *Gomme* (1); *Cawkwell* v. *Russell* (2); *Harvey* v. *Walters* (3); and as the stuff cannot be separated the Defendant has a right to stop the whole. The Plaintiff is clearly a wrongdoer, and the Defendant has a right to stop him until he cuts off the additional flow: *Gale* on Easements (4); *Jones* v. *Tapling* (5). *Renshaw* v. *Bean* (6) proceeded on a mistaken principle. At all events the injunction is too large.

Mr. *Lindley*, Q.C., Mr. *Tindal Atkinson*, and Mr. *J. H. B. Browne*, for the Plaintiff.

THEIR LORDSHIPS expressed their concurrence in the construction which the Vice-Chancellor *Hall* had put upon the grant, but thought that the decree ought to be varied, and made a decree as follows:—

Cur. The Plaintiff by his counsel submitting to this order:

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in the road had never been taken into consideration. The right must be measured according to the principle laid down by Mr. Justice *Willes* in *Williams* v. *James* (Law Rep. 2 C. P. 577), as a reasonable use for the purpose of the land in the condition in which it was when the user took place, that is, in the case of this mansion, in the state in which it was when the grant was made. The matter must however be looked at reasonably, and no small addition to the house would be improper. Here there had been a very large increase.

It had also been argued that the easement must be measured by the quantity which the ditch would contain, but there was no authority for such a doctrine, which would give rise to very difficult questions. Some similar questions might no doubt arise in this case, as the owner of the easement might send down so large a quantity as not to leave room for the quantity sent by the owner of the land, but this would probably be of much less importance.

The Defendant was wrong as regarded his contention as to the cesspool, and the Plaintiff was right in his claim to use the moat or ditch as a cesspool, but not to the extent to which he had claimed. The Plaintiff would therefore have no costs, and there would be no inquiry as to damages suffered by the Defendant.

(1) 11 A. & E. 759.
(2) 26 L. J. (Ex.) 34.
(3) Law Rep. 8 C. P. 162.
(4) Page 581.
(5) 12 C. B. (N.S.) 826, 845.
(6) 18 Q. B. 112.

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That the decree be varied and do stand as follows:—That an injunction be awarded to restrain the Plaintiff from allowing the drainage from the additional buildings erected by him to go into the cesspool in the bill mentioned. Restrain the Defendant from preventing the free passage of water and soil into the existing cesspool, being the moat or ditch in the bill mentioned. No inquiry as to damages: no costs to either party.

Solicitors for the Plaintiff: Messrs. *Lempriere, Turner, & Clayton.*

Solicitor for the Defendant: Mr. *A. G. Ditton.*

L. JJ. 1875 *July* 13.

UNITED LAND COMPANY *v.* GREAT EASTERN RAILWAY COMPANY.

[1872 U. 4.]

Railway Company—Level Crossings—Easement—Change of Condition.

1 Ch. D. 365. 7 Ch. D. 136-9 9 Ch. D. 418 13 Ch. D. 802-6 Eq. D. 261-2 4 Ch. D. 2.

Lands were bought by the Crown under an Act enabling the Crown to buy lands for the purpose of fortifications, but providing that the lands were not to be built upon or sold. By an Act authorizing a railway to be made through these lands, the railway company were obliged to make level crossings giving access to part of the lands then a marsh or pasture.

The Crown, under the authority of a subsequent Act, sold a part of the lands, and the purchasers proposed to build houses thereon:—

Held, that the purchasers could build houses thereon, and that the occupiers of the houses would be entitled to make use of the level crossings, and an injunction granted against obstruction of the level crossings, but not so as to prevent the company from using the railway for the reasonable working of their traffic.

Decree of *Malins*, V.C., affirmed, with a variation.

THE Crown had, under 8 Anne, c. 21, acquired certain lands near *Harwich* for the purpose of fortifying the harbour of *Harwich*. The Act contained a provision that no private buildings should be erected on the lands so acquired, and that they should be inalienable from the Crown, and should not be demised except during pleasure.

By the Act 10 & 11 Vict. c. clxxv. the *Eastern Union Railway Company* was empowered to make a railway to *Harwich*, and for that purpose to take lands in the usual manner. Some of the lands so to be taken were Crown lands, so acquired as above mentioned, and by the 19th section of the Act it was enacted that "the said company shall and they are hereby required, at their own costs and charges, to make and construct such convenient communications across, over, or under the said railway, where it shall be carried through or over the lands of Her Majesty as shall in the judgment of the Commissioners for the time being of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, be necessary for the convenient enjoyment and occupation of the lands of Her Majesty; and such communications, when so made, shall at all times be kept in good order and repair by and at the expense of the company."

The railway was accordingly made through and upon the lands of Her Majesty, and four level crossings were made to the satisfaction of the Commissioners of Woods and Forests over the railway where it was carried through the lands of Her Majesty, two of them being thirty feet and two of them being twenty feet wide.

The conveyance by the Crown to the railway company did not describe the crossings, but recited only that the works had been completed, and contained a covenant by the company to keep the crossings in repair.

At the time when the Act was passed, and for several years afterwards, a great part of the lands on the west side of the railway, access to which was obtained by means of these level crossings, was marsh or pasture lands merely.

In 1866 the Commissioners of Woods and Forests agreed to sell to the *Harwich Harbour Company* a part of the Crown lands on the west of the railway, together with certain rights of way over the Crown lands and the use of two of the level crossings.

By the *Harwich Harbour* (*Reclamation of Land*) *Act*, 1866, this agreement was confirmed, and it was declared that all covenants and agreements therein contained on the part of the Commissioners of Woods and Forests should be binding on her Majesty and her successors, and should be binding on the company.

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By an indenture dated the 1st of November, 1871, the Commissioners of Woods and Forests and the *Harwich Harbour Company* released and conveyed the lands agreed to be sold to the *Harwich Harbour Company*, with the rights of way and the use of the level crossings, to the *United Land Company*.

The *United Land Company* had published a notice offering a part of these lands for sale in building lots, whereupon the *Great Eastern Railway Company* (who had acquired the *Eastern Union Railway*) gave notice to the *United Land Company* that the level crossings were not to be used by the owners of any of the houses so to be built. The railway company also left trucks for many hours consecutively across the level crossings, thereby completely blocking them up, and sometimes kept the gates locked.

The *United Land Company* filed the bill in this suit against the railway company, praying that the railway company might be restrained from obstructing the Plaintiff company or their tenants from the free use of the level crossings.

The Vice-Chancellor *Malins* granted an injunction, as reported (1), and the Defendants appealed.

Mr. *J. Pearson*, Q.C., and Mr. *Smart*, for the Appellants:—

The Plaintiffs have only the right to use the crossings in the same way as they would have been used when the Act was passed: *Reg.* v. *Brown* (2). The company will be unable to carry on their traffic if these crossings are to be in continual use by all the occupiers of these houses to be built. If such a state of things had existed at the time, probably no such crossings would have been given: *Williams* v. *James* (3); *Allan* v. *Gomme* (4); *Cowling* v. *Higginson* (5). The Crown was only to have the usual accommodation works of agricultural land. Moreover, this land was at the time under the restrictions of the Act of Anne, and could neither be built upon or sold; and even if the *Harwich Harbour Company's Act* authorizes a sale, it does not release the land from the restrictions as to building. The company had a

(1) Law Rep. 17 Eq. 158.
(2) Ibid. 2 Q. B. 630.
(3) Law Rep. 2 C. P. 577.
(4) 11 A. & E. 759.
(5) 4 M. & W. 245.

right to rely on these restrictions being continued when they agreed to give these level crossings.

Mr. *Cotton*, Q.C., and Mr. *Townsend*, for the Plaintiffs, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decree of the Vice-Chancellor in this case is perfectly right. The land belonged to the Crown, and a clause was inserted in an Act of Parliament that the railway company were to make such communications for the convenient enjoyment of the lands as the Commissioners of Woods and Forests should in their judgment think necessary.

It seems to me impossible to say that that clause involves a restriction that the communication is to be only such as they shall think necessary for the convenient enjoyment and occupation of the lands exactly in their present state, and for their present purposes, and for no others. The object was, of course, that the severance of the land by the railroad should leave the owner of the land as fully master of the land for all purposes as he was before, so that he did not interfere with the working of the line, exactly in the case of the usual reservation of minerals. The object is simply to give to the railway company an uninterrupted right of way for themselves across the land, but not to take away from the owner anything that is not absolutely necessary for the purpose of the railway. That being so, it seems to me unreasonable to assume that the Commissioners could require communications for the convenient enjoyment and occupation of the lands only as they were at the time. It appears that these lands were acquired for the purpose of making fortifications and the like, but it is quite clear it was not intended that they should only be used for the purpose of such fortifications and works as were in existence at the time when the *Railway Act* was passed. It could not be intended that the Crown was to be restrained from building any quantity of works, or any quantity of forts, or any quantity of barracks, or roads and approaches to them, and from using these roads for the purpose of such forts or barracks. The construction put upon the clause by the Appellants would actually prevent the

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Crown from using these new roads for the purpose of any new forts. The Appellants have admitted that if the Crown builds works, and builds forts there, then the Crown would have the right; but I cannot see how such restrictive words are to be brought into the clause, even if we adopt the construction admitted by the Appellants.

I am of opinion that there is nothing in the circumstances of the case, or in the situation of the parties, or in the situation of the land, to prevent the words from having their full operation. I assume that the communications were to be such as the Commissioners should think necessary for the convenient occupation and enjoyment of the land. They have thought certain level crossings, thirty feet and twenty feet wide, necessary for that purpose, and I quite agree with the Vice-Chancellor that it is impossible that such roads could ever be intended merely as roads of communication from one side of the marsh to the other, and for the purpose of pasturage on the marsh as it then was.

I think that the construction must be that which the Vice-Chancellor has put upon the clause: that is to say, that these crossings are to be communications for every purpose to which at the time, or at any future time, the owner should think fit to appropriate his land. I am of opinion, therefore, that the appeal must be refused with costs.

SIR G. MELLISH, L.J.:—

3 L.D. 802 I am of the same opinion. Where a right of way is claimed by user, then, no doubt, according to the authorities, the purpose for which the way may be used is limited by the user; for we must judge from the way in which it has been used what the purposes were for which the party claiming has gained the right. But when a right of way is created by grant, or by Act of Parliament, then it must depend on the proper construction of the grant, or Act of Parliament, whether the right of way is to be used for all purposes, or for only limited purposes.

No doubt there are authorities that, from the description of the lands to which the right of way is annexed, and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes. But if there is no limit

in the grant, the way may be used for all purposes. This is a way which has been granted according to the terms of an Act of Parliament, on which we must put a reasonable construction. [His Lordship then read the clause.]

Now the question is, does that mean that the crossings are to be made only for the use and occupation of the lands in the condition in which they then were, or that they were to be made for all purposes, and for the use of the land, in any condition in which it might thereafter be?

It is to be observed that this clause is not confined to level crossings, because there is to be communication across or under the railway. Suppose the communication had been made over the railway by a bridge, or under the railway by a tunnel, and that the Crown had required a bridge to be made of a certain size, capable of carrying a certain weight, or a tunnel to be made of a certain description, it would be very absurd to suppose that the Crown could not use that bridge or that tunnel for any purposes which the Crown might think fit. Then is any different construction to be put upon the clause because it is a level crossing? No doubt it makes this difference, that the tunnel or the bridge, to a certain extent, would be the property of the Crown, whereas in the level crossing it remains still the property of the railway. But still, if the use for which the communication is to be made is unlimited in one case, it seems very absurd to limit the use in the other case.

That being so, when we look at the conveyance of the land to the railway company, we find in it no limitation whatever. The deed simply recites that those level crossings have been made, and then the lands are conveyed to the company.

It appears to me that there is nothing which can possibly operate to restrain the Crown, or the persons who claim under the Crown, from using both level crossings for any purposes for which they can be used, subject of course to not improperly interrupting the traffic.

I think that what has been said about the Statute of *Anne* really has nothing to do with the case. Of course that restriction was not passed for the benefit of the company, and the company

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not entitled to the benefit of it. The only effect of that restriction was that the Crown could not part with the land without obtaining an enabling Act of Parliament, but it was no part of the bargain with the company that the Commissioners would not obtain such an Act. The lands became useless for the purpose of defence, and the Crown never bargained with the company that it would not part with them, and that it would not sell the lands for the best price, or have them employed in any manner which might be most suitable.

Therefore I am of opinion that there is nothing to restrain the Crown from selling the land for any purpose it thought fit, and nothing to restrain the purchasers from the Crown from using these rights of way across the level crossings for any purpose that may be convenient for the enjoyment of the land.

We think, however, that a slight alteration ought to be made in the form of the decree, but that will make no difference as to the costs.

MINUTES:—It is ordered that a perpetual injunction be awarded to restrain the company from permitting any train, engine, carriage, or truck, to stand across the said level crossings, or either of them, and from doing or permitting any other act, so as to obstruct or impede the Plaintiffs or their tenants or lessees, or the occupiers of the lands purchased by the Plaintiffs, or any of them, from or in the free and uninterrupted use and enjoyment of the said level crossings, or either of them; but this injunction is not to restrain the company from the use of the railway for the reasonable and proper working of the traffic.

Solicitor for the Plaintiffs: Mr. *H. Smith.*
Solicitor for the Defendants: Mr. *W. H. Shaw.*

In re CANADIAN OIL WORKS CORPORATION.

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1875;
July 19, 20.

Director—Agent—Dealings with Principal—Contributory—Call.

Before the formation of a company for the purchase of certain property the vendors agreed with *H.* that he should become a director, they providing him with the forty shares necessary to qualify him. He thereupon signed the memorandum of association in respect of forty shares, and became a director. At a meeting of the directors cheques were drawn on the bankers of the company and given to the vendors in payment of part of the purchase-money. One of these cheques being for the same amount as that due on *H.'s* shares was given by the vendors to *H.*, and was by him paid in to his own bankers. He then drew a cheque on his own bankers, and gave the cheque to the company in payment of the sum due on his shares. The company was afterwards ordered to be wound up:—

Held, that *H.*, being a director of the company, could not retain money so paid to him by the vendors; that the money had never ceased to be the money of the company; that there had in fact been no payment by *H.* of the money due in respect of the shares; and that he was liable as a contributory in respect of these shares.

Decision of *Malins*, V.C., affirmed.

Orgill's Case (1) disapproved of.

IN the month of August, 1871, *A. P. Longbottom*, a financial agent in *England*, who had been in communication with *George Prince* and others, owners of certain oil works in *Canada*, was engaged in getting up a company which should purchase these oil works. He applied to one *J. L. O'Beirne* to get a good board of directors, and *O'Beirne* introduced Sir *John D. Hay* and others as directors. The exact terms on which Sir *John Hay* was to become a director were not clearly made out, but it was certainly understood that Sir *John Hay* was to receive from the vendors his qualification of forty £25 shares; and he received from *Longbottom* a letter of indemnity. Somewhat similar arrangements were made with four other persons who were to become directors. Sir *John Hay* thereupon signed the memorandum and articles of association as holder of forty shares.

The articles were dated the 30th of August, 1871. The com

(1) 21 L. T. (N.S.) 221.

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pany was to be called the *Canadian Oil Works Corporation, Limited.* The capital of the corporation was to be £340,000 in £25 shares, and £160,000 was to be borrowed in £12 per cent. Debenture Bonds of £100 each, and the vendors were to receive £480,000 for the oil works, £160,000 in cash and £320,000 in shares, leaving apparently only 800 shares for the public; but the debenture-holders were to be entitled to certain shares which the vendors were to supply. The directors of the corporation were to affix the seal of the corporation to a contract then prepared and engrossed, and to be dated in September, 1871, whereby one *Edeveain,* as agent for the vendors, agreed to sell, and the corporation agreed to buy, the oil works for £160,000 in cash and £320,000 in shares. The directors were authorized to pay all preliminary expenses; and there was a provision that the contract was conditional only, and not to be binding upon the corporation, unless and until they gave to *Edeveain* notice of their intention to make it absolute, and it should then become absolute, but if such notice should not be given before the 1st of October, 1871, the contract should be void. In August a deputation was sent out to *Canada* to examine the property, and reports were sent home by them to the directors, who determined to confirm the contract, and on the 4th of October did confirm it as on the 1st of October. The whole of the £160,000 in bonds appeared to have been subscribed for, and out of this money £80,000 was paid to the vendors in part payment of the £160,000.

It was at first arranged that Sir *John Hay* should have forty of the shares which were paid to the vendors, but on the suggestion that this might leave Sir *John Hay* liable, an arrangement was, shortly before the 1st of December, 1871, made by his solicitors or by *O'Beirne* on his behalf, that *Longbottom* should advance the £1000 to pay for the shares.

On the 1st of December, 1871, there was a meeting of the board of directors, at which a further payment of £58,000 was made to *Longbottom,* as agent for the vendors, by eight cheques for different amounts drawn on the bankers of the corporation and made payable to *Prince.* One of the cheques was for £1000, and was signed by two of the other directors; the other cheques were signed by Sir *John Hay,* who was chairman of the meeting, and by

another director. The cheque for £1000 was then indorsed by *Longbottom* as agent for *Prince*, and was given by *Longbottom* to Sir *John Hay*, and by him paid to his account at his bankers. He then drew on his bankers a cheque for £1000, which he paid to the bankers of the company in payment for the forty £25 shares.

One of the other directors received a similar cheque for £1000, and paid for his shares in the same manner; the other three directors received their qualification in shares from the vendors.

In April, 1872, fourteen of the £100 bonds of the corporation became payable, and as there were not funds in hand to meet them, the directors subscribed £5500 for the purpose; Sir *John Hay* subscribing £1540 and receiving fourteen of the bonds. As to £1000 of this £1540 he claimed a set-off against the £1000 now claimed on behalf of the corporation.

On the 16th of November, 1872, an order was made for winding up the corporation, and Sir *John Hay* and his four co-directors were placed on the list of contributories in respect of forty shares of £25 each. One of the directors was placed on the list in respect of ten other shares also. None of the 800 reserved shares had been issued, but a considerable number of the vendor's shares had been sold to different persons. Only the five directors, however, were on the list of contributories.

On the 16th of May, 1873, a summons was taken out for a call of £25 on each share held by each of the five contributories; upon this summons the Vice-Chancellor *Malins*, on the 5th of June, 1875, made an order for payment by Sir *John Hay* of £1000 in respect of his forty shares.

Sir *John Hay*, now by way of appeal, moved to discharge this order.

Longbottom had deposed that he paid the money as agent for the vendors, and for the qualification of Sir *John Hay*; Sir *John Hay* had deposed that he considered the £1000 a loan from *Longbottom*, and that in November, 1872, his solicitor offered to return the £1000 to *Longbottom*, who refused to receive it.

The *Solicitor-General* (Sir *J. Holker*), Mr. *Higgins*, Q.C., and Mr. *Romer*, in support of the appeal:—

Sir *John Hay* is a heavy loser by this company. He has ad-

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vanced to them upwards of £1500, which, if he is held to have received the £1000 as trustee for the company, he can set off against that £1000. But *Orgill's Case* (1) is clear authority that Sir *John Hay* is not liable to repay this money. Nothing is more common than for the promoters to find the qualification for directors. It is not easy to get good directors, and they must be recompensed. This money belonged to the vendors, and was by them freely given to Sir *John Hay*, and with it he paid for his shares. How, then, can the company have any claim upon him or on the shares? It is possible that something may be recovered under sect. 165 of the *Companies Act* (25 & 26 Vict. c. 89), but there is no fraud on the company. The contract and the price were all fixed before this money was paid; and as to any fraud, Sir *John Hay* had the strongest inducement to do the best for the company, as he had nothing but the shares. All was done openly, and there was no concealment or suspicion of wrong about the transaction. Although *Longbottom* immediately gave the cheque to Sir *John Hay*, still it was made payable to *Prince*, and was not available without *Longbottom's* indorsement, and had therefore become *Prince's* property. If *Prince* had brought an action against the company for the £58,000, the payments by these cheques could all have been pleaded, and *Prince* could not say that he had paid £1000 back to Sir *John Hay* as trustee for the company. The liquidator can have no more rights than the company would have had, and can only enforce such claims as the company might have under sect. 165 of the Act of 1862: *Waterhouse* v. *Jamieson* (2). The company here consists of the five directors only, as far as appears on this summons, and a whole company can ratify anything—even a breach of trust. They all concurred in drawing these cheques, or were aware of the transaction. No doubt, as a general rule, a director cannot, whilst acting on behalf of the company, receive anything for his own benefit; but there is nothing to prevent anything from being done which is stipulated for by the articles of association. They may provide for the purchase of property from some of the directors at a fixed sum, and so a director may get a large profit. Here this money was to be paid to the vendors, and the company was not in the least

(1) 21 L. T. (N.S.) 221. (2) Law Rep. 2 H. L., Sc. 29.

concerned with the use they might make of the money. By the articles the directors were authorized to pay out of the capital of the company all expenses incurred about or incidental to the formation of the company. Now Sir *John Hay* was one of the promoters, and as such had a right to a fair remuneration. In *Heymann* v. *European Central Railway Company* (1), under similar circumstances, a shareholder was not relieved of his liability. A shareholder may have an action against Sir *John Hay*, but the company cannot recover anything from him. It is not true that the directors had to bargain with the vendors, and the conditional clause in the contract was not to provide against the directors being dissatisfied, but against the company failing on account of the shares not being taken. At the time when the cheque was given the contract was complete, and the directors had no further bargain to make with the vendors, who could have recovered the £58,000.

The vendors could not have been obliged to sell for less money even if they had not paid these sums to the directors. There is nothing wrong in a director having dealings with vendors, and it is even common for vendors, when they take many shares, to stipulate that they shall have the nomination of some of the directors to look after their interests. Why should not a vendor who retains a large number of shares, and is deeply interested in the company, pay a director something beyond the allowance, if a competent director is thereby secured? *Beck* v. *Kantorowicz* (2). If the agreement was that the vendors were, out of their shares, to give Sir *John Hay* forty shares, he would be under no liability: *Brown's Case* (3). Sir *John Hay* made a mistake, and took the £1000 instead. *Prince* might have paid the money to anybody else, and why are the company to get it because he paid it to Sir *John Hay?*

Mr. *Glasse*, Q.C., and Mr. *Cookson*, Q.C., for the official liquidator:—

Orgill's Case (4) cannot be supported, and is inconsistent with *In re London and Provincial Starch Company* (5).

(1) Law Rep. 7 Eq. 154.
(2) 3 K. & J. 230.
(3) Law Rep. 9 Ch. 102.
(4) 21 L. T. (N.S.) 221.
(5) 20 L. T. (N.S.) 390.

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We say that the money was never *Prince's* and remained the company's, and that Sir *John Hay* has not paid anything to the company. Even if Sir *John Hay* has advanced money to the company, that cannot be set off against calls. It cannot be contended that directors can as shareholders ratify breaches of trust or other irregularities. We must recover this money from Sir *John Hay* as a director under sect. 165, or from him as a shareholder under sect. 23 of the *Companies Act*, 1862. The principle of this case is the same as that of *Parker* v. *McKenna* (1). It is clear that the purchase-money was enhanced by the sums which would have to be paid to these directors. It is not true that the £58,000 was *Prince's*, for we may hereafter contend that we ought to recover the whole of that money as improperly paid. In a very similar case, *In re Western of Canada Oil, Lands, and Works Company* (2), the money was ordered to be repaid. As to the set-off, it is not exactly true that Sir *John Hay* might have advanced part of his £1540 in payment of his shares for he has got bonds for the amount, and he cannot have both shares and bonds. He has paid off no debt of the company; he merely paid for the bonds and took them, and has them now. The original liability accrued on the signing of the memorandum, and it has not been discharged. The drawing of the cheque with the cognisance of Sir *John Hay* as chairman was a clear breach of trust. Though the cheque passed through his bankers the money remained ear-marked, and continued the money of the company. If such a transaction can stand, a director or officer of the company would merely have, in satisfaction of a call, to take some of the company's money and put it back: *Fawcett* v. *Whitehouse* (3).

The *Solicitor-General*, in reply:—

It is absurd to suppose that the price asked in such a case was at all enhanced by the payments which the vendors would have to make, and that they would have taken £159,000 instead of £160,000. They could not sell the property except to a company, and they must have spent money to get up the company. How

(1) Law Rep. 10 Ch. 96. (2) Law Rep. 20 Eq. 580.
(3) 1 Russ. & My. 132.

else could a company be formed? This £1000 was a legitimate outlay, and there is no reason to believe or suspect that the interests of the company were neglected by the directors. The directors were obliged to pay the money to the vendors, who could then do what they liked with it. *Longbottom* might have kept the money till now, and might now give it to Sir *John Hay* to pay this call with, and could any one say that that would be invalid? Or Sir *John Hay* might have kept the money till now and might now pay with it. These transactions between the vendors and the directors might afford grounds for rescinding the contract, but not for reducing the price, which this in fact comes to.

SIR W. M. JAMES, L.J.:—

The facts of this case, so far as they are material, are few and undisputed, and the conclusion of law which follows from those facts is to my mind perfectly clear.

It appears that certain gentlemen were minded to induce the English public to buy for a very large sum certain oil wells and plant in *Canada*, which could only be done by means of a joint stock company. In this state of things these gentlemen apply to a body of English gentlemen of position and say to them, "Pretend to be shareholders, pretend to be promoters, pretend to have made a contract with us, and invite the world to join you as shareholders, and invite them to believe that you are the promoters and to participate with you in the contract which you will pretend you have made. We will find you the shares, we will indemnify you against all the expenses, we will have the contract made by ourselves cut and dried ready for signature, and we will give you a part of the purchase-money which we are to receive in money or shares, and, besides that, you will have your profits as directors of this company." And that body of English gentlemen consented and condescended to become on these terms the hired retainers of some unknown adventurers from the other side of the *Atlantic*. In pursuance of this arrangement, they sign a memorandum of association by which they stipulate to take shares, and they become liable to take shares. In further pursuance of that arrangement, a contract which was conditional in form was made

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complete by these gentlemen. Money appears thereunder to have become payable—a large sum in money and a large sum in shares. While this thing was *in fieri*, and still incomplete as far as regards payment of the money to the vendor or the agent of the vendor, these gentlemen, as directors of the company, meet at the board of the company, and there, in payment of that part of the consideration which was to be paid to one of them (Sir *John Hay*), his co-directors draw a cheque for £1000, and he draws two other cheques for two other persons in the same condition as himself for £1000 each, that being in exact accordance with the stipulation which they had made—that their shares were to be found and paid for by the vendors. The £1000 was given to Sir *John Hay*, and a cheque was given to one of the other gentlemen in the same position. It was never intended to be, and never did become, under the control or power of the vendors. It never left the board-room, but was immediately indorsed as intended, and according to the bargain, in favour of these gentlemen by the agent of *Prince*, the principal vendor. It was a cheque by which the money of the company was taken by one of the directors under the authority and with the consent and knowledge of his co-directors for the purpose of paying that which was a bribe to him for having sold the company in the transaction. No right to that cheque ever passed to *Prince* or *Longbottom;* no right to that cheque ever passed to Sir *John Hay*. It never, in the contemplation of this Court, ceased to be the property of the company. With that money, the property of the company, so taken by a director out of the funds of the company, the calls on the shares are said to have been paid.

Of course, the money could not be so applied. The calls, therefore, have never been paid, and Sir *John Hay* has, by the Vice-Chancellor, rightly been made liable to pay for those calls as unpaid. It is said, indeed, that there is some authority for what was done, and *Orgill's Case* (1) was cited. In my opinion it is much to be regretted that that case was not left *requiescere in pace*, and that its frailties should have now been dragged forth to public gaze. I cannot understand that case; there is evidently some mistake in what is said there, because the principle upon which it

(1) 21 L. T. (N.S.) 221.

was said that the company had lost their right to recover money which was then paid by the vendors to the directors was that they did not repudiate the contract. Now, in every one of the cases it is where a contract is not repudiated that the money is recovered from the agent, because if the contract is repudiated, if the principal who has been defrauded is relieved from everything, and is restored to his original position, of course he has then nothing whatever to do with the moneys which have passed, or which it has been agreed should pass, between the confederates. That case stands alone, and has been left unnoticed until now; it is entirely inconsistent with the whole current of authority in this Court, from the time when *Fawcett* v. *Whitehouse* (1) was decided down to the present day, in which it has always been held that no agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal. That was a principle repeated by me, and it has been repeated most emphatically by the full Court of Appeal in the case of *Parker* v. *M'Kenna* (2). I again desire to repeat that this Court will never sanction anything of that kind, and will make the persons who engage in such schemes pay back to the uttermost farthing whatever they have received.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. There is no doubt about the rule of this Court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. It is perfectly settled law that that rule applies with peculiar stringency to the directors of joint stock companies who are the agents of the company for effecting the sales or the purchases made by the company; and the only question in the present case is whether that principle applies to it, and whether Sir *John Hay* has, without the knowledge of his principals, made a profit out of his agency for which he is accountable in this Court.

There are two views of the facts of this case, and if it had been

(1) 1 Russ. & My. 132. (2) Law Rep. 10 Ch. 96.

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necessary to decide between them, I should have wished perhaps for some more time to consider which is the correct view, namely, whether this payment was really made in pursuance of the contract with Sir *John Hay* at the time when he agreed to become a director, or was a voluntary payment made without any such contract.

Now, according to Sir *John Hay's* account of his bargain with the promoters at the time when he assented to become a director, it was that a sufficient number of shares should be transferred to him for the purpose of forming his qualification. Then he says that he signed the memorandum of association, and found to his surprise that that made him liable to pay the full amount of the calls on the shares. Of course, his being taken by surprise makes no difference at all. If that really was the bargain between them, then this payment was not made in pursuance of any contract which had been previously made, but was a voluntary payment made at the time. On the other hand, according to *Longbottom's* account, it rather appears as if the bargain had been that he should be indemnified altogether, and that his qualification should be found for him. If his qualification was to be found, and he signed the memorandum at the request of the promoters, then that would amount to a bargain on their behalf that they would pay the amount of his calls for him. But, in my opinion, it is wholly immaterial which of those two views is correct, for in either point of view I think he is accountable for the sum which he received.

The argument in his favour, as I understand it, is put mainly upon the ground that he was not an agent at the time when he made the contract to receive his qualification; but it is plain that the contract was contemporaneous with his becoming an agent. I cannot think that there is any difference between a profit made by an agent after he has become an agent, and profit through a bargain made by him at the time when he becomes an agent—a bargain made, not with his principal, but with a person who is proposing to enter into a contract with the principal. While negotiations are proceeding, and before any contract is concluded between the vendor and the purchaser, the vendor says to some particular person, "If you will become the agent of the purchaser, and you succeed in carrying out the contract with me, then I will

make you a payment out of the purchase-money which shall ultimately be paid." It is impossible, as it appears to me, that such a transaction could in this Court stand for a moment. It is perfectly clear that in this case the promoters did not enter into a bargain with Sir *John Hay* to make it worth his while to be a director, and at all events, and under all circumstances, to pay him something for becoming a director, even supposing that such a transaction could stand. But the bargain here was that if he would become a director, and if while he was a director the purchase is carried out, then out of the shares, or out of the money which would become payable by the purchasers, the vendors would either give him so many shares or pay him in money the value of those shares.

By the terms of the contract, the directors had the choice within a certain period to say whether the company should be bound by the contract, and nothing can be plainer than that if they had exercised their option not to be bound by the contract, and the contract had gone off, the vendors would not have been bound to hand over any shares to Sir *John Hay*, because they would not have received any shares, and would not have been bound to pay him any sum out of the purchase-money, because they would have received no purchase-money; but still the company would remain a company, and might have gone on with its business. Therefore the bargain which was really made with him as a director was, "If you will become a director of the company, and will act as agent on behalf of the proposed purchasers in carrying out that contract, I will make you an allowance out of the purchase-money."

Now, suppose the second supposition to be the right supposition in this case, and that this was a purely voluntary payment made at the time when the £58,000 was paid, could that transaction stand in this Court? It would be exactly like a very ordinary transaction. A gentleman employs his servant to pay his tradesman's bills, and the servant goes to the tradesman and says, "I have received the money to pay your bill, but you must make me a present out of it." The tradesman says, "I am willing to make you a present." Then a sum is deducted, the money is put down, and it is handed back. In a certain sense, no doubt, that sum of

L. JJ. 1875 HAY'S CASE.

money will become the property of the servant. He could not be indicted for embezzlement, nor probably for putting it into his own pocket and using it, but there is no doubt that if an account was properly taken in any Court of Justice, he would be answerable for it, because it is perfectly obvious that if the creditor who received the payment is willing to make a deduction and discount from the sum he had received, that must be for the benefit of the master who is making the payment, and not for the benefit of the servant, who, without the consent of his master, has no right to receive any such profit.

Now, assuming that there was previously no binding contract in relation to the payment for those shares, that is exactly what this transaction was. The directors were the agents of the company for the purpose of paying the vendors of these oil wells a sum of £160,000 in cash and £320,000 in shares. It is perfectly obvious that they had a most important duty to perform—a trust to carry out towards the company in regard to that transaction. In the first place, they had the power of rescinding the contract altogether, and they were to say whether the contract should be rescinded or not, and even after the contract had been made absolute their duties did not cease, because if at any time before the whole of the purchase-money was handed over they received information that there had been any fraud in the making of the contract, they might have refused to pay the rest of the money. And, considering how little they knew about it, and what little information they had, nobody could tell that such information would not reach them at any time.

Now, is it to be tolerated that an agent or trustee who is in such a situation shall make a bargain with the vendor that if a sum of money is paid to the vendor without dispute, he shall make a certain allowance to the agent or trustee? It is quite clear that that was practically what was done; for, without relying on the evidence of *Longbottom*, which it is said ought not to be relied upon, it is perfectly plain from the transaction itself, and from the way in which the cheques were drawn, that it must have been communicated to *Longbottom* that they would be drawn in particular sums, and that there would be one cheque drawn for £1000, which was to be returned to Sir *John Hay*. It is perfectly plain that there must

have been that understanding beforehand, because otherwise the transactions in the board-room could never have taken place.

It is idle to say that if there is a rule in a Court of Equity that a director is a trustee—that he is an agent, and that he cannot make a profit out of his agency unknown to the company—such a transaction as this should stand. As in *Parker* v. *McKenna* (1), he was an agent at the time when this profit was bargained for, and at the time when the profit was received, therefore the result is, that it was received for the benefit of the company.

That being so, it appears to me quite clear that when the company seek their redress from the agent who has so behaved, they have their choice, and can say that this cheque never became the property of *Prince*, but remains the property of the company, and therefore the sum due on the shares has never been paid; or if they thought it more for their interests, they might have said, "You having paid this cheque nominally to pay up your shares, we will ratify that part of the transaction and hold your shares as paid, and then say that the money with which you paid for them was our money, and therefore you must pay that money back to us." In my opinion, the consequence of a transaction of this nature is, that the *cestui que trust* has an election in which way he may choose to treat it. He is entitled to say that the calls are unpaid, and are now to be paid.

I entirely concur in the observations the Lord Justice has made about the cases, and I do not think it necessary to refer to them any further. In fact, the principle is perfectly settled, and we have only to look to the application.

The appeal will be dismissed with costs.

Solicitors for the Official Liquidator: Messrs. *Mercer & Mercer.*
Solicitors for Sir *John Hay:* Messrs. *Gedge, Kirby, & Millett.*

(1) Law Rep. 10 Ch. 96.

L. JJ.
1875
July 28.

MACDOUGALL *v.* GARDINER.

[1874 M. 200.]

Company—Directors calling a Meeting—Jurisdiction.

20 Eq 674

Where, by the articles of association of a company, the directors, and in the alternative a certain portion of the shareholders, can summon a meeting of the company, the Court will not order the directors to summon a meeting for the general purposes of the company.

Order of *Malins*, V.C., reversed.

THE bill in this suit was filed by *A. W. MacDougall*, on behalf of himself and all other shareholders in the *Emma Mining Company* (except the Defendants), against the four directors of the company and Mr. *Hutton*, whose position as director was denied by the Plaintiff, and against the company. The bill stated and the Plaintiff deposed to the formation of the company, and that the Plaintiff held 350 shares, and that the Plaintiff wished to become a director, but was opposed by the other directors. That at a meeting of the company on the 15th of May, 1874, the Defendant Mr. *Hutton* was declared by the chairman to be elected a director. That the Plaintiff then filed a bill to have it declared that he was a director, but by filing demurrers the Defendants had prevented the Plaintiff from obtaining the proper information. That on the requisition of the Plaintiff and others a general meeting of the company was held on the 14th of October, 1874; and the bill stated that there were many irregularities in the conduct of that meeting. And the bill prayed a declaration to that effect, and a declaration that certain resolutions were duly passed at that meeting, and were binding on the directors, and in the alternative that a meeting of shareholders might be forthwith summoned for the purpose of having those resolutions submitted to the meeting.

By the articles of association of the company the directors had power at their discretion to summon a meeting; and were, upon a requisition by members of the company holding in the aggregate shares to the nominal amount of one-fifth of the capital of the company, to convene a special general meeting; and if the

directors did not proceed to convene the meeting within thirty days, then the requisitionists, or any other members holding the required amount of shares or stock, might themselves convene a meeting.

The Plaintiff, on the 29th of June, moved in this suit that a certain injunction already granted might be continued, and for production of documents, and for leave to amend by striking out the name of the company as Defendant and adding the company as co-Plaintiff. On this motion, the Defendants undertaking not to make any arrangement with the vendors of the mine until such arrangement should have been submitted to the shareholders, an order was made by Vice-Chancellor *Malins* for production, and "that the Defendants do forthwith summon a general meeting of the company to take steps for electing a governing body of the Defendant company, and for general purposes."

A motion was now made on behalf of the company by way of appeal, that so much of the order as directed a meeting to be summoned might be discharged.

Mr. *J. Pearson*, Q.C., and Mr. *Colt*, for the company:—

The Court has no authority to direct a company to call a meeting for general purposes: *Mozley* v. *Alston* (1). The shareholders can themselves convene a meeting. No doubt a case might be made for the interference of the Court, but no such case has been made here.

Mr. *Higgins*, Q.C., and Mr. *Wintle*, for the directors.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, Q.C., for the Plaintiff:—

The Plaintiff says that the directors were improperly elected, and this is a bill to rectify the impropriety. We want to amend and make the company co-Plaintiff, and in order to do that we ought to know what is the wish of the company, and that can only be done by a meeting. The meeting was suggested by the Vice-Chancellor, and no proceeding can be more proper. *Atwool* v. *Merryweather* (2), *Featherstone* v. *Cooke* (3), are clear authorities

(1) 1 Ph. 790.
(2) Law Rep. 5 Eq. 464, n.
(3) Law Rep. 16 Eq. 298.

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as to the power of the Court to direct a meeting to be summoned.

SIR W. M. JAMES, L.J.:—

I am of opinion that this order cannot be sustained. Perhaps it is to be regretted that the Court has no jurisdiction in these matters to do what is right or what is beneficial for the parties, but Lord *Cottenham* seems to have indicated clearly in *Mozley* v. *Alston* (1) that the Court has no jurisdiction whatever to do that which it is for the company itself to do according to the provisions of the articles. If a general meeting is wanted for any purpose, then the directors, if they think it for the interests of the company, have power to call a general meeting; but I do not think that the Court has any jurisdiction to compel the directors to call the meeting, when they may honestly think it not for the interests of the company to do so. Then if the directors do not call the meeting, it is left to the shareholders to call it, with these restrictions, that before the company can be called together, and before they can be put to any such inconvenience, one-fifth of the shareholders must give in a requisition to the directors, and if one-fifth do not join in it, then there is no power to call the meeting.

Now, what power have we to say that a general meeting is to be called, if the directors do not think it right, and if one-fifth of the shareholders will not sign a requisition for the purpose? We have no authority, and there is, as it appears to me, no reason why we could interfere to do that which the shareholders have a right to do for themselves. The great principle laid down in the two cases of *Mozley* v. *Alston* and *Foss* v. *Harbottle* (2) was, that whatever should be done by the company itself through its own internal organization, ought to be left to the company, and ought not to be interfered with by this Court. In the cases which have been cited, and upon the statement of which the Vice-Chancellor seems to have altered his original opinion, there was a doubt whether the legal proceedings had been authorized by the company; and the Court said that a meeting ought to be summoned in order to ascertain whether the company desired its name to be continued

(1) 1 Ph. 790. (2) 2 Hare, 461.

as Plaintiff or Defendant. Of course that was a very obvious and very necessary proceeding, but that is not a direction to call a meeting for any purpose connected with the management of the company, or to do anything which the company could do for itself according to its own organization.

I am of opinion that the order so far as appealed from ought to be discharged, on the ground which the Vice-Chancellor originally took, viz., that there is no jurisdiction.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I cannot see how the Court has power to take the management of the company out of the hands of the directors, at any rate whilst the question is still in litigation, whether they are properly directors or not. If a case happened in which there were no directors, or in which there was a majority, and they had neglected to appoint directors, or directors had died, so that there was not a quorum, then I do not say whether the Court might not have yielded to the proposal to summon a meeting in order to prevent the company from altogether coming to an end. In this case it is not necessary to consider that question, as there is a board of directors who are *de facto* acting, and it has not been determined that they were not properly appointed. Under these circumstances, I cannot see how the Court can deprive them of the discretion which is given them by the articles. By the articles it is in their discretion whether to summon a meeting or not, and the Court cannot take the management of the company in that respect out of their hands.

Solicitors for the Plaintiff: Messrs. *Valpy & Chaplin.*

Solicitors for the Defendants: Messrs. *Sole, Turners, & Knight;* Messrs. *Bischoff, Bompas, & Bischoff.*

L. JJ.
1875
July 28.

FREWEN *v.* FREWEN.

[1874 F. 69.]

Irish Church Act (32 & 33 *Vict. c.* 42), *s.* 18—*Compensation Money—Executor—Devisee—Ademption—Conversion.*

A testator made a devise of advowsons in *Ireland*. The *Irish Church Act* was then passed abolishing advowsons and giving their owners a right to compensation. The testator after the passing of the Act made a codicil to his will and then died. Compensation for the advowsons was claimed on behalf of the devisee, and was ascertained and made payable to the executors of the testator:—

Held, that the compensation money was payable to the executors of the testator, and not to the devisee of the advowsons.

Decision of *Hall*, V.C., affirmed.

THOMAS FREWEN, deceased, was seised in fee of five advowsons in *Ireland*. By his will, dated the 26th of September, 1867, he devised two of these advowsons to trustees for 3000 years, and subject thereto to the use of his son *Richard Frewen* for life, with remainders over in strict settlement. On the 1st of July, 1869, he made a codicil to his will appointing another executor. On the 26th of July, 1869, the *Irish Church Act*, 1869, was passed (1). In the month of January, 1870, *Thomas Frewen* gave instructions for an application to the Commissioners under the Act for compensation in respect of his advowsons.

On the 10th of October, 1870, he made another codicil to his will, and on the 14th of October, 1870, he died.

(1) 32 & 33 Vict. c. 42. By sect. 2 it is enacted that on and after the 1st day of January, 1871, the Church of *Ireland* should cease to be established by law. By sect. 10, save as hereinafter mentioned, no person after the passing of the Act is to be appointed by virtue of any right of patronage or power of appointment to any benefice in or connected with the said Church. By sect. 18 the Commissioners are to ascertain and declare the amount of compensation which ought to be paid to any person who should within three years from the passing of the Act make application in writing to this effect in respect of any advowson vested in such person and affected by the provisions of the Act, and are to pay such person accordingly. By s. 66 if any vacancy occur in any benefice between the date of the passing of the Act and the 1st of January, 1871, such vacancy may be filled up by the same person or persons who would have been qualified to fill up the same if the Act had not passed.

In July, 1872, applications in writing, signed by the guardian of *Richard Frewen* (an infant) were sent in to the Commissioners for compensation in respect of the advowsons devised to *Richard Frewen* for life. The Commissioners ascertained and declared the amount of compensation for the advowsons, but made the money payable to the executors of the testator.

A special case was thereupon stated for the opinion of the Court, whether the compensation money was part of the testator's personal estate, or was real estate and represented the advowsons.

The Vice-Chancellor *Hall* decided that the devise had failed, and that the compensation money was to be paid to the executors as part of the testator's personal estate (1).

The devisee of the advowsons appealed.

(1) 1875. June 30. W.N. (1875) 161

SIR CHARLES HALL, V.C., expressed his opinion that the contention of the executors upon this Act was correct. The 10th section of the Act provided that, save as thereinafter mentioned, there should be no presentation to any benefice. If, then, after the passing of the Act there was to be no presentation to these livings, or to any one of these livings, except for a short time from the passing of the Act, the benefice had no existence for any purpose of presentation excepting that so provided for. This necessarily destroyed the effect of any existing will which subsequently came into operation purporting to devise an advowson or living, except so far as the saving might have any operation for this purpose. That being so, the devise of the advowsons was reduced to nothing. No doubt the Act of Parliament by the 66th section said that up to a particular time specified, if there should be a vacancy, the vacancy might be filled up by such person as would have been qualified to fill up the same if the Act had not passed. That is to say, in this particular case there being a will which would have devised the advowson if the Act had not passed, the person who under that will would have been the patron and the person to present was to be at liberty to present. But the Act did not say, or in effect say, that for all purposes the advowson was to exist, but only that the person who would have been the patron was to present, and that person was to be ascertained by looking at the title under the will.

That being the case, there would, independently of the compensation clause, have been an end to the advowson, and the will would so far have been inoperative. But the 18th clause of the Act provided for payment of compensation to the person in whom the advowson was vested at the time of the passing of the Act. The Act no doubt gave a period of three years for making the claim to compensation, but it did not mean that during that three years the persons entitled to compensation should be uncertain or fluctuating. In that state of things, and wishing the claim to be made, the testator did not think proper to make any specific provision

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Mr. *Karslake*, Q.C. (Mr. *T. D. Salmon* with him), for the Appellants:—

Drant v. *Vause* (1) and *Emuss* v. *Smith* (2) were relied upon on the other side, but do not apply. This Act does not convert real estate into personal estate, and the testator cannot be considered to have intended any such conversion. Besides, the Act might have been repealed. *Lawes* v. *Bennett* (3), and *Townley* v. *Bedwell* (4), shew what the law is: *Watts* v. *Watts* (5). In *Ex parte Hawkins* (6) and the earlier cases the testator had made an agreement to convert. Here, until compensation was awarded, the devisee might have presented if a vacancy occurred, and he might have even sold the expectation of a vacancy; he therefore took the property in specie at the testator's death, and nothing which was done afterwards could convert it. It is impossible to suppose that the testator intended so great a change to be made in the disposition of his property merely because the Legislature thought fit to disestablish the Irish Church.

Mr. *Greene*, Q.C., Mr. *Dickinson*, Q.C., Mr. *Ince*, Q.C., and Mr. *Macnaghten*, for the Respondents, were not called upon.

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disposing of that compensation money, although he did make a codicil to his will. Consequently the compensation was part of his personal estate.

The claim for compensation was made after his death, being sent in on behalf of the devisee under the will, but the Commissioners rightly considered that the money was payable to the executor.

The words as to Roman Catholics at the end of the 18th section were rather in favour of the same conclusion, because that portion of the Act had reference to the ownership of the advowson at the time of the Act passing, and clearly fixed that as the date at which the person who was to have the benefit was to be ascertained.

The cases which were referred to did not really affect the conclusion. *Drant* v. *Vause* (1 Y. & C. Ch. 580), and *Emuss* v. *Smith* (2 De G. & Sm. 722), both depended upon the existence of an option in some other person. Those cases were both observed upon by the Vice-Chancellor *Wood* in *Weeding* v. *Weeding* (1 J. & H. 431), and he, too, put the decision entirely on the existence of an option. But none of these cases had any application to the present case, which depended entirely upon the Act of Parliament. The case of *Richards* v. *Attorney-General* (6 Moo. P. C. 381) seemed to bear more upon the point.

(1) 1 Y. & C. Ch. 580.
(2) 2 De G. & Sm. 722.
(3) 1 Cox, 167.
(4) 14 Ves. 591.
(5) Law Rep. 17 Eq. 217.
(6) 13 Sim. 569.

SIR W. M. JAMES, L.J.:—

I have really no doubt upon this case, and in my opinion the Vice-Chancellor is quite right.

The Act of Parliament destroyed the advowson, that is to say, it converted that which was an advowson with a perpetual right of presentation to a living in the Established Church, into something different. The Church was not disestablished till a year and a half after the Act was passed, but during that year and a half the testator died. The property, which was vested in the testator at the time when the Act was passed, had its character permanently changed and practically destroyed. The Act provides that the Commissioners shall as soon as they can after the passing of the Act—not as soon as they can after the year 1871 when the Church was to be disestablished, but as soon as they can after the Act is passed—ascertain what compensation is to be given to the owner, that is to say, to the man who was the owner at the time when the Act was passed. The same case arises when land is taken from a man who cannot help himself, when though the money may not be paid till some time afterwards, still the land becomes personal estate.

In all these cases, where the thing has been either by contract or by operation of law converted, there is no equity between the legal and the personal representatives or between legal devisees and personal legatees. And it does not make any difference that there was during the year and a half a provisional arrangement for the person who would during that year and a half have had the advowson. This does not alter what the Act has done, that is to say, the conversion of that which was an advowson in the hands of the then owner into a right to receive the compensation which shall be assessed by the Commissioners.

The case is clear on all the authorities, and on the principle of converting realty into personalty. In my opinion the Vice-Chancellor is quite right.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *James, Curtis, & James.*

L. JJ.
1875
July 29.

In re CARIBBEAN COMPANY.

CRICKMER'S CASE.

Company—Contract for fully paid-up Shares—Companies Act, 1867, s. 25.

The memorandum of association of a limited joint stock company established for working guano stated that the capital of the company should consist of 2500 shares of £10 each. The articles contained a clause providing that all the original shares should be considered fully paid-up shares; and a clause empowering the directors to purchase property for the company with paid up shares. All the original shares, except one share retained by each of the subscribers of the memorandum, were allotted, as fully paid-up shares, to the vendor of a concession for working guano, in pursuance of a contract made by him with one of the promoters of the company; but this contract was not registered. The company was afterwards ordered to be wound up:—

Held (affirming the decision of *Malins*, V.C.), that the articles of association did not constitute a contract within the 25th section of the *Companies Act*, 1867, and that the holder of vendor's shares, who took them with notice of the circumstances under which they were allotted, was liable to calls to the full nominal amount of the shares.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The *Caribbean Company, Limited*, was registered under the *Companies Act*, 1862, on the 9th of February, 1871.

The memorandum of association stated that the object of the company was to acquire, from any person or persons, or governments, mediately or immediately, and being a member or members of the company or not, and either by purchase or otherwise, rights and powers to work guano, phosphate of lime, and other deposits or minerals in the *Caribbean Islands* in the *West Indies*, and elsewhere; and to purchase and construct the necessary mines and works.

The capital of the company was stated to be £25,000, divided into 2500 shares of £10 each. The articles of association contained (among others) the following provisions:—

Clause 6. The sum of £10 per share on 2500 original shares in the company shall be considered as fully paid up, and all new shares in the company for the time being unissued shall be

allotted, appropriated, and disposed of for the benefit of the company to such persons, at such times, and in such manner as the directors shall in their discretion think fit; but the company shall not at any time purchase, deal with, or sell any shares of the company.

Clause 88 contained, among other powers given to the directors, the following authority:—

They may purchase, take on lease, or otherwise acquire for the company, rights and powers to work guano, phosphate of lime, and other deposits or minerals in the *Caribbean Islands* in the *West Indies*, and elsewhere; may purchase, take on lease, or otherwise acquire for the company, any real or personal property in the *United Kingdom* or elsewhere, under such title, at such prices, and upon such terms as they may think fit.

They may pay for the acquisition of any property by these presents authorized to be acquired by the company either in cash or shares, to be treated as either wholly or in part paid up, or partly in cash and partly in such shares, or in such other manner as the directors from time to time may deem expedient.

The memorandum of association was signed by seven persons for one share each, and the remaining 2493 shares were allotted to Mr. *E. Oliver*, in pursuance of an agreement made on the 27th of October, 1870, between him and Mr. *Carmichael*, one of the promoters of the company, as the price of a concession granted to him by the Government of the *United States* for the exclusive right of exporting guano from certain islands in the *Caribbean Sea*.

All these shares were allotted as fully paid-up shares, but the agreement with *Oliver* was not registered in accordance with the 25th section of the *Companies Act*, 1867, nor was there any specific mention of it in the articles of association.

On the 6th of May, 1871, the company executed a mortgage deed to *Carmichael* of certain cargoes of guano to secure an advance of £1200 expressed to be advanced by him for the purpose of the undertaking. Of this sum £1000 was supplied by Mr. *J. E. Crickmer*, a stockbroker, who afterwards advanced, through *Carmichael* £1000 more to the company. On the

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occasion of these advances *Crickmer* received as a bonus 919 shares, part of those allotted to *Oliver*, which were transferred to him as fully paid-up shares. Of these he was the registered owner of 669 shares at the date of the commencement of the winding-up.

On the 2nd of August, 1872, a petition was presented, under which an order was made for winding up the company.

The official liquidator took out a summons for a call of 1*s.* on each share held by *Crickmer*, which was adjourned into Court. The Vice-Chancellor held that *Crickmer* was liable for the full nominal value of the shares, and ordered the call to be made on that footing. *Crickmer* appealed from this decision.

The Vice-Chancellor was of opinion, and the Lords Justices, on hearing the evidence, concurred in the opinion, that *Crickmer* had full notice of the circumstances under which the shares were allotted to *Oliver*.

Mr. *Waller*, Q.C., and Mr. *Bunting*, for the Appellant:—

Assuming that *Crickmer* had notice of all the circumstances, we contend, notwithstanding, that he is entitled to hold these shares as fully paid up. The articles of association contained a contract in writing that the original shares should be all considered paid-up shares, and that the directors might apply them in the purchase of any concessions or other property for the use of the company. That was a contract in writing within the 25th section of the *Companies Act*, 1867. *Pritchard's Case* (1), which was relied on by the other side in the Court below, is distinguishable; that case only decided that the articles did not constitute a contract between the company and the vendor; but they do constitute a contract between the shareholders *inter se*, of which the creditors have notice. There is no real inconsistency between the memorandum and the articles. The shares, although paid up, formed the capital of the company, for they were issued for the purpose of purchasing property for the company. It has been repeatedly decided that every one, in dealing with a company,

(1) Law Rep. 8 Ch. 956.

(2 Ch. D. 447 (C.A.) 1875)

must be taken to have notice of the provisions of the articles of association.

Mr. *Higgins*, Q.C., and Mr. *Grosvenor Woods*, for the official liquidator, were not called on.

SIR W. M. JAMES, L.J.:—

It appears to me that this appeal is perfectly idle. There is no registered contract in writing in this case. The registration of articles of association, inconsistent with the memorandum, is not the registration of a contract within the meaning of the 25th section of the Act. It must be a contract which shews what shares are to be issued fully paid up, and for what consideration they are to be issued. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The meaning of the articles of association is obscure, but it seems to me to be that the directors shall have power to make presents of paid-up shares. The meaning of the 25th section is that there must be a written contract, by virtue of which the shares are to be issued fully paid up, with some person external to the company. That is the thing to be registered, and not a mere contract between the shareholders. Such a clause in the articles cannot be a written contract within the meaning of the Act.

Solicitors: Messrs. *Bellamy, Strong, & Edgelow;* Messrs. *Newbon & Co.*

L. JJ.
1875
July 30.

In re WEST HARTLEPOOL IRONWORKS COMPANY.

Company—Winding-up—Supervision Order or Winding-up Order—Wishes of Creditors—Companies Act, 1862, *ss.* 91, 149.

After a petition by a creditor for winding up a company had been presented the company duly passed a resolution for voluntary winding up. At the hearing a majority in number and value of the creditors appeared, and asked to have the voluntary winding-up continued under supervision, and no creditor except the Petitioner asked for a winding-up order. Vice-Chancellor *Bacon*, however, made an order for compulsory winding-up. From this order a number of the creditors, being a majority of the unsecured creditors, appealed; other creditors supported the same view, and no one but the Petitioner asked for a compulsory winding-up:—

Held, that it sufficiently appeared without calling a meeting of creditors, that the majority of the creditors desired the voluntary winding-up to be continued under supervision, and that, as it was not shewn that this would do any injustice to the petitioning creditor, a supervision order ought to be made, a creditor not being entitled *ex debito justitiæ* to a winding-up order as between himself and other creditors, though he is so entitled as between himself and the company.

THIS was an appeal from an order of Vice-Chancellor *Bacon*.

Messrs. *Forwood*, as creditors of the *West Hartlepool Ironworks Company*, presented a petition to wind up the company on the 8th of June, and three shareholders presented a similar petition on the 17th of June. Both petitions came on to be heard together before Vice-Chancellor *Bacon* on the 10th of July. In the meantime the company had duly passed a resolution for a voluntary winding-up. At the hearing of the petitions Messrs. *Forwood* pressed for the usual order for compulsory winding up. The Petitioners on the second petition asked that the voluntary winding-up might be continued under supervision, and this latter view was supported by large bodies both of creditors and contributories, who appeared by counsel at the hearing. Vice-Chancellor *Bacon* made an order on both petitions to wind up the company compulsorily. A number of the creditors who had appeared appealed.

It appeared that the total of the debts was about £255,000, of which about £206,000 were unsecured. Creditors to the amount of about £140,000, of which only a small part was secured, appeared

at the hearing and supported the application for a supervision order. The Appellants were creditors, whose debts amounted to £112,000, and included a majority in value of the unsecured creditors. These circumstances were proved on the appeal by the affidavit of the secretary, which was not contradicted.

Mr. *De Gex*, Q.C., Mr. *Fry*, Q.C., and Mr. *Housley*, for the Appellants:—

By sect. 91 of the *Companies Act*, 1862, the Court "in all matters relating to the winding-up" is to have regard to the wishes of the creditors and contributories. Here a great majority both of the creditors and of the contributories wish for a winding-up under supervision. It is not *ex debito justitiæ* that a creditor who cannot get his debt paid should have an immediate winding-up order: *In re Western of Canada Oil, &c., Company* (1). Vice-Chancellor *Wood*, in *In re Inns of Court Hotel Company* (November 17, 1866) remarks forcibly on the advantages which a winding-up under supervision has over a compulsory winding-up, and *Re Owen's Wheel and Tire Company* (2) is to the same effect. The Act does not in terms make it obligatory on the Court to order a winding-up in any case; that a creditor is entitled *ex debito justitiæ* to a winding-up order is only a rule drawn from the justice of the case, and the rule is laid down by Lord *Cranworth* as applying between the company and the creditor, not as between creditors: *Bowes* v. *Hope Mutual Insurance Society* (3). In the case of *In re Oriental Commercial Bank* (before Vice-Chancellor *Wood*, July 16, 1866; Lord-Chancellor, August 4, 1866) it is intimated that if the creditors had expressed their wishes in time the Court would have attended to them.

Sect. 149 of the Act appears conclusive, and *In re Langley Mill Steel and Ironworks Company* (4) is precisely in point. It is most undesirable to place the law on a footing which will encourage small creditors to insist upon a compulsory winding-up order in the hope of getting bought off by payment in full.

Mr. *W. Pearson*, Q.C., and Mr. *Caldecott*, for a large majority

(1) Law Rep. 17 Eq. 1.
(2) 22 W. R. 151.
(3) 11 H. L. C. 389.
(4) Law Rep. 12 Eq. 26.

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In re WEST HARTLEPOOL IRONWORKS COMPANY.

both in number and amount of the shareholders, stated that they desired a supervision order.

Mr. *Jackson*, Q.C., and Mr. *A. T. Watson*, for the company.

Mr. *Horton Smith*, for other creditors.

Mr. *Kay*, Q.C., and Mr. *Robinson*, Q.C., for Messrs. *Forwood*:—

The creditors have not held any meeting, and according to sect. 149 a meeting is the proper way of ascertaining their wishes, because it affords an opportunity of discussing the matter. As their views have not been ascertained in the proper way the Court will take the ordinary course of directing a compulsory winding-up. This is better for creditors than a voluntary winding-up, as it relates back to the presentation of the petition.

SIR G. MELLISH, L.J.:—

Although a creditor of a company who cannot get paid his debt after having served his proper summons is entitled *ex debito justitiæ* as between him and the company to an order for winding up, yet, in my opinion, if a resolution for a voluntary winding-up has been passed before the time when the petition for a compulsory winding-up comes on to be heard, the 91st and the 149th sections of the Act make it the duty of the Court to have regard to the wishes of the body of the creditors in determining whether there shall be a compulsory winding-up, or whether the voluntary winding-up shall be continued under supervision. The 149th section says that the Court may have regard to the wishes of the creditors if proved to it by any sufficient evidence. If there is no sufficient evidence then it may order a meeting of the creditors to be called.

The question really in this case is whether there is sufficient evidence to enable us to decide without calling a meeting of creditors that the majority of creditors desire to have the voluntary winding-up continued under supervision, and if they do, whether there is anything in the peculiar circumstances of this case which makes it unjust as respects the particular creditor who

has presented the petition, that such an order for continuing the voluntary winding-up should be made.

Now, in my opinion, it appears by sufficient evidence that the majority of the creditors desire to have the voluntary winding-up continued under supervision. Creditors to a very large amount, in fact an actual majority in value of the unsecured creditors, have joined in the petition of appeal. Their debts are proved by affidavit, and are not disputed by the other side; they are creditors to the amount of £112,000. There are a very considerable number of other creditors who appear by another counsel, and support the same view. Whether there are beside the petitioning creditor any creditors who wish for a compulsory winding-up order does not appear. Under these circumstances, in my opinion it sufficiently appears to us, without any general meeting of creditors, that the majority of the creditors think that they will have a better chance of obtaining payment of their debts if the voluntary winding-up is continued under supervision than if a compulsory order for winding up is made. In my opinion there is no reason why their wishes should not be complied with. The creditor who has presented the petition for compulsory winding up has not brought forward any grounds from which it appears that any injustice will be done to him, or that he will not obtain payment in the case of the voluntary winding-up being continued as soon as or sooner than if there were a compulsory winding-up.

I am of opinion, therefore, that the Court ought to have regard to the wishes of the creditors, and that the voluntary winding-up ought to be continued under supervision.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Messrs. *Flux & Co.;* Messrs. *Shum, Crossman, & Crossman;* Mr. *R. T. Jarvis;* Messrs. *Lewis, Munns, & Longden.*

L. JJ.
1875
July 30.

HODGKINSON *v.* CROWE.

[1873 H. 124.]

Lease—Usual Clauses—Proviso for Re-entry.

7 Ch D. 557.
560

Held (reversing the decision of *Bacon*, V.C.), that, under an agreement for a lease to contain "all usual and customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on non-payment of rent.

Semble, the rule is not limited to mining leases.

THIS was a motion by the Defendant by way of appeal from a decision of Vice-Chancellor *Bacon* on an adjourned summons.

In September, 1871, the Plaintiff agreed to grant a lease to the Defendant of the mines and minerals under an estate in *North Staffordshire*. A memorandum of terms and conditions was signed, the terms being as follows: "Term of lease twenty-one years, with the option of renewal for seven, fourteen, or twenty-one years more. Lease to commence 29th September, 1871. One shilling per ton royalty for all calcined ironstone. Eightpence per ton for all slack. Minimum rent to be £250 per annum. Quarterly payments for rents, 25th March, 24th June, 29th September, and 25th December. To pay only for what is gotten the first year. Thirty days of grace allowed for payments of rent after becoming due. Not to work the mines and minerals where they cannot be worked at a profit in consequence of their thinness. Lease to determine if the mines and minerals are exhausted before the end of twenty-one years. To pay double rent for surface damage, but not to exceed £3 10*s.* per acre. To work the mines and minerals in conjunction with any adjoining, if required, on payment of 1*d.* per ton for wayleave or shaftage rent. To be allowed three years for making up deficiencies for rents. To work the mines and minerals in a proper and workmanlike manner. To erect engines, buildings, &c., and to make tramways, &c., &c., with power to take down and remove the same at the end of the lease. To have power to get clay, marl, and sand, make and burn bricks for the use of the colliery; but if any are sold, to pay 1*s.* per thousand rent

or royalty, and 2*d.* per ton for any sand sold. To have all usual and customary mining clauses. The cost of lease and counterpart to be paid by each party in equal proportions."

Disputes having arisen as to the terms of the lease, the Plaintiff filed his bill for specific performance, and Vice-Chancellor *Bacon* made a decree declaring that the Plaintiff was not entitled to a proviso for re-entry on the bankruptcy of the lessee, or to a covenant in restraint of alienation; and that the Defendant was not entitled to a proviso enabling him to have the user of coal and slack for calcining ironstone, or for use in the steam engines, and for burning bricks, without paying royalty thereon; and directing the agreement to be specifically performed having regard to these declarations, the lease to be settled by the Judge (1).

The question now in dispute was, whether the Plaintiff was entitled to have inserted in the lease a proviso for re-entry on non-payment of rents or royalties, "or if and whenever there shall be any breach of any of the covenants and agreements by the lessee herein contained." Vice-Chancellor *Bacon* held that he was so entitled, and the Defendant moved to vary the order, and to have it declared that the Plaintiff was not entitled to have inserted a proviso for re-entry upon breach of any of the covenants or agreements in the lease, or otherwise than upon non-payment of rent.

Mr. *Jackson*, Q.C., and Mr. *Hamilton Humphreys*, for the appeal motion:—

According to the principles of *Church* v. *Brown* (2) this proviso ought not to be inserted, for it is "in contradiction to the quantity of interest which the demise itself was by the agreement to give to the lessee;" and it is not enough for the Plaintiff to shew that it is not uncommon to insert such a proviso. It cannot be called a usual one in mining leases. In the precedents in *Platt* on Leases it is not inserted. In *Jarman's Bythewood's* Conveyancing (3) it is sometimes inserted and sometimes not. In *Davidson's* Precedents (4) it is inserted; but some of the leases are leases under powers which may have required its insertion; and in one precedent (p. 341) there is an elaborate proviso con-

(1) Law Rep. 19 Eq. 591.
(2) 15 Ves. 258.
(3) Ed. Sweet, vol. iv.
(4) 2nd Ed. vol. v.

(51 Sol. Jn. (1875) 159.

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fining the operation of the clause to a breach of covenant persisted in after notice. It is in the highest degree unreasonable that a tenant under a mining lease who must incur immense outlay should be liable to be ejected for every trifling breach of covenant.

Mr. *Kay*, Q.C., and Mr. *Ince*, Q.C., *contrà* :—

A proviso for re-entry of this nature is found in most of the precedents in *Jarman's Bythewood's* Conveyancing (1). In *Prideaux's* Precedents (2) it is treated as usual; and it occurs in a precedent in *Bainbridge* on Mines (3). The more recent books of precedents are almost uniform in inserting it. This being the ordinary practice of conveyancing, the parties must be supposed to have contracted with reference to it.

[The LORD JUSTICE JAMES referred to *Chambers'* Landlord and Tenant (4), and the observations of Vice-Chancellor *Wigram* in *Blakesley* v. *Whieldon* (5).]

A clause of this kind is nothing more than a reasonable protection to the landlord.

SIR W. M. JAMES, L.J. :—

I am not sorry that this case has been brought before us, and that I have an opportunity of expressing an opinion upon the very important point which is raised by this summons; a point which has been the subject of careful study by me over a period of many years, so that I believe I was before the argument familiar with almost all the books, authorities, and precedents which have been cited. I am of opinion that it is impossible upon any principle to hold that a man who has entered into an agreement for a lease for a term of years absolute is obliged to take a lease for a term of years determinable upon the breach of some one of a great number of conditions, covenants, or stipulations contained in the lease. No authority has been produced in support of such a contention, and so far as there are authorities upon the point (I am setting aside now the forms of leases on which some reliance has been placed) the authorities are the other way.

(1) Ed. Sweet. vol. iv.
(2) Vol. ii. p. 18.
(3) Page 718.
(4) Page 445.
(5) 1 Hare, 176.

I have referred to a book which I believe to be a book of authority, *Chambers* on the Law of Landlord and Tenant, compiled in part from notes by the Recorder of *Bombay*, Sir *William David Evans*, and published as far back as the year 1823, in which the matter is fully considered, and it is there laid down as settled that such a condition as this cannot be inserted except under particular stipulations (1). In *Church* v. *Brown* (2) the matter before the Court was with reference to a restraint upon alienation which was claimed upon exactly the same ground as that relied upon in the present case, namely, that it had become a usual clause for the protection of the landlord, and Lord *Eldon* says (3): "Before the case of *Henderson* v. *Hay* (4) therefore upon an agreement to grant a lease with nothing more than 'proper covenants,' I should have said they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate, and though the word 'incidental' is not very precise, I conceive Lord *Thurlow's* meaning to have been that the party had a right to those covenants that would be inserted in the execution of an agreement for a lease arising out of the general well-known practice as to such leases, and not contradicting the incidents of the estate belonging to a lessee, one of which is the right to have the estate without restraint beyond what is imposed upon it by operation of law, unless there is an express contract for more." Then he goes on to say (5): "The safest rule for property is that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make, and that nothing which flows out of that interest as an incident is to be done away by loose expressions to be construed by facts more loose, that it is upon the party who has forborne to insert a covenant for his own benefit to shew his title to it, and that it is safer to require the lessor to protect himself by express stipulation than for Courts of Equity to hold that contracting parties shall insert, not restraints expressed by the contract or implied by law, but such, more or less in number, as individual conveyancers shall from day to day pre-

(1) Page 445.
(2) 15 Ves. 258.
(3) 15 Ves. 264.
(4) 3 Bro. C. C. 632.
(5) 15 Ves. 268.

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scribe as proper to be imposed upon the lessee, and that all those restraints so imposed from time to time are to be introduced as the aggregate of the agreement." Then the form of the usual power to lease is expressed by Lord *St. Leonards, Sugden* on Powers (1), in these terms: "In the usual power of leasing, besides the reservation of the best rent, it is generally required that the lessee covenant for payment of the rent, that a clause be inserted for re-entry in default of payment, that the lessee be not made dispunishable of waste, and that he execute a counterpart of the lease, and if any of these conditions be not complied with the lease will be void." That is the usual form of power, requiring a clause of re-entry only in default of payment of rent. If it had been looked upon as one of the usual and necessary incidents in a lease that there should be a clause of re-entry for a breach of every covenant, that would have been required in the usual power of leasing. The Legislature, in the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), has introduced the same form (2), requiring a proviso for re-entry upon non-payment of rent, but not upon a breach of any covenant. A clause for re-entry for non-payment of rent is always inserted without any opposition by anybody. It has never been disputed by any tenant, because both at law and in equity the lessee can be relieved from the forfeiture by payment of his rent after the period of forfeiture has arrived, just as a mortgagor can redeem his estate though the time fixed by the mortgage deed for redemption has passed; so that the proviso only operates as a penalty. A clause of re-entry for breach of covenants generally, where, as there are no means of ascertaining the compensation, a Court of Equity cannot relieve, stands on quite a different footing.

Then it is said, that as the landlord parts with his estate he has a right to have this clause of forfeiture for breach of covenant inserted as a reasonable and proper protection. The Vice-Chancellor seems to have been of opinion that it is a very reasonable and proper stipulation to be inserted. I am bound to say, having had some experience in these cases, that I not only do not consider it a proper and reasonable thing to introduce, but to my mind it is a most odious stipulation, it is offensive, and it is oppres-

(1) 8th Ed. p. 818. (2) Sect. 2, sub-sect. 5; but see sect. 32.

sive beyond measure; and it never, in my opinion, has been submitted to by lessees except upon a general notion that lessors are men of honour and liberality, and will not incur the odium which they would incur in the eyes of their neighbours if they endeavoured to enforce their strict right by insisting on a forfeiture of a valuable estate in which, perhaps, the whole of the lessee's fortune may have been embarked, because he has through inadvertence committed a breach of covenant which may not have done the lessor a shillingsworth of damage.

A case in which I was counsel many years ago produced a strong effect upon my mind—a case where a forfeiture was enforced in which there was no legal defence, and no equitable relief could be obtained. Extensive copperworks were forfeited by reason of a breach of covenant in not keeping up a fence which had become perfectly useless, and the not keeping it up did not do one shillingsworth of damage to anybody. Cases of that kind shew how oppressively such a power may be used, and there is no necessity for giving it in the absence of express stipulation. A landlord before he parts with his property can make any stipulation he likes, and if he wishes to let his land, not for an absolute term, but for a term determinable upon certain events, it is for him to provide by the agreement for the insertion in the lease of the provisoes and stipulations which he thinks necessary for his protection. In agreements for building leases in the neighbourhood of *London* and other places where building speculations are conducted on a very extensive scale, the difficulty is always avoided by inserting in the agreement, either by way of schedule or express enumeration, the clauses which are to be inserted in the leases.

I am of opinion that there is no authority for inserting the form of proviso to which the Defendant objects, and such a proviso is so unreasonable and oppressive that it would take a great deal of authority to make me give my sanction to it.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *E. Doyle;* Messrs. *Tibbitts & Co.*

L. JJ.
1875
June 24.

WESTERN OF CANADA OIL, LANDS, AND WORKS COMPANY *v.* WALKER.

[1874 W. 255.]

Practice—Limited Company—Security for Costs—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 69.

3 Ch D. 65
1 Ch D 808

Where a limited company which was in course of being wound up was Plaintiff, it was ordered to give security for costs for a limited sum until the Defendants applying for security had put in their answers, with liberty to them, when their answers were put in, to renew the motion in order to obtain further security.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Malins*.

Walker and *Smallman*, two of the Defendants, moved, on the 22nd of March, 1875, before Vice-Chancellor *Malins*, that, pursuant to sect. 69 of the *Companies Act*, 1862, the Plaintiffs, the *Western of Canada Oil, Lands, and Works Company*, or the official liquidator thereof, might be ordered to give sufficient security to those Defendants for their costs of the suit, and that in the meantime all further proceedings might be stayed as against them.

The Vice-Chancellor made an order that the Plaintiffs should procure some sufficient person on their behalf to give security, according to the course of the Court, by bond to the Clerk of Records and Writs, in the penalty of £100, to answer any costs that might be awarded to the Defendants. This order was prefaced by a statement of the opinion of the Court, that no further security should be given by the Plaintiffs than for the costs of putting in the answer of the Defendants applying; and liberty was given to the Defendants to renew their motion to obtain further security after putting in their answers.

Walker and *Smallman* moved to vary this order, and to have security given to a larger amount, and to cover their costs of the whole suit.

Mr. *Davey*, for the Appellants:—

The Vice-Chancellor read the bill, and appeared to form an im-

See SC on similar application from the other suit
W.N. (1875) 209. 1 Ch D.

pression favourable to the Plaintiffs, and then determined to give no security except for the costs of putting in the answers. It is submitted that the merits cannot be gone into on a question of security for costs, and that we ought to have substantial security for the costs of the whole suit.

Mr. *Whitehorne* (Mr. *Higgins*, Q.C., with him), for the Plaintiffs.

SIR W. M. JAMES, L.J.:—

This is so much a matter of discretion, that I should be slow to interfere with the order of the Judge of first instance, even if I did not entirely agree with him. It appears to me, however, to be by no means an inconvenient course to require security to be given for the costs up to a certain stage in the proceedings, and then to allow the application to be renewed. The Court will be able to form a much better opinion as to the probable expense of the suit, and as to the amount of security required, when the answers have come in.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Bischoff, Bompas, & Bischoff;* Messrs. *Lewis, Munns, & Longden.*

In re WEST HARTLEPOOL IRONWORKS COMPANY.

Winding-up—Concurrent Proceedings—Transfer.

When a petition to wind up a company has been presented, another petition for the same purpose subsequently presented and attached to a different branch of the Court will be ordered to be transferred to that branch of the Court to which the first petition is attached.

THIS was an application to transfer a petition from the Court of Vice-Chancellor *Hall* to that of Vice-Chancellor *Bacon*.

On the 8th of June Messrs. *Forwood*, as creditors of the *West Hartlepool Ironworks Company, Limited*, presented a petition for the compulsory winding-up of the company. This petition was attached

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to the Court of Vice-Chancellor *Bacon*, and was answered for Saturday, the 26th of June.

On the 17th of June, *Pyman*, *Stephenson*, and *Kelk*, three of the shareholders in the company, presented a winding-up petition attached to the Court of Vice-Chancellor *Hall*. This petition was answered for the 25th.

Messrs. *Forwood* now moved that the second petition might be transferred to the Court of Vice-Chancellor *Bacon*.

Mr. *W. F. Robinson*, for Messrs. *Forwood*, referred to *Orrell* v. *Busch* (1) and *Lucas* v. *Siggers* (2).

Mr. *Dickinson*, Q.C., and Mr. *Caldecott*, *contrà*.

SIR W. M. JAMES, L.J.:—

It has been established as a general rule that, where a suit has been instituted, a person who institutes another suit relating to the same subject-matter ought to institute it in the same branch of the Court as the former, and that a second suit relating to the same subject-matter will be ordered to be transferred to that branch of the Court to which the first suit is attached. The reason of these rules applies as much to winding-up proceedings as to suits, and the transfer asked must be made.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Flux & Co.*; Messrs. *Shum, Crossman, & Crossman.*

(1) Law Rep. 5 Ch. 467. (2) Law Rep. 7 Ch. 517.

Ex parte TILL. *In re* RATCLIFFE.

L. JJ.
1875
June 10.

Liquidation Meeting—Registration of Resolutions—Offer of Composition refused —Resolution not reduced to Writing—Adjournment of Meeting—Offer accepted at adjourned Meeting—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-ss.* 7, 8), 126—*Bankruptcy Rules*, 1870, *rr.* 275, 295.

At the first meeting under a liquidation petition the debtor offered a composition. His solicitor took the votes of the creditors and found that the requisite majority in favour of it could not be obtained, but the question was not formally put from the chair, nor was any resolution reduced into writing. A resolution to adjourn the meeting was then carried, and at the adjourned meeting the debtor's offer was accepted, and the resolution to accept it was duly confirmed at the second meeting. The resolution for adjournment was written and signed, and filed with the proceedings:—

Held by the Chief Judge (reversing the decision of a County Court Judge), that the Court could have no regard to any resolution which was not written and signed, and that, consequently, the resolution accepting the composition was valid, and must be registered:

Held, on appeal, that the adjournment and all the subsequent proceedings were invalid, the offer having been rejected by the first meeting.

THIS was an appeal from a decision of the Chief Judge reversing that of the Judge of the County Court of *Stafford*.

John Ratcliffe, an architect and surveyor at *Stafford*, filed a liquidation petition. The first meeting of creditors was held on the 4th of January, 1875. Eleven creditors were present in person or by proxy, all of them being creditors for more than £10, and the total of their debts being £267. The debtor's solicitor was prepared with an offer of a composition of 2*s.* 6*d.* in the pound, went round and took the opinion of all the creditors upon it, added up the votes, and found that though there was a majority in favour of it, there would not be the requisite majority of three-fourths in value. It did not appear that the question whether it should be accepted was put from the chair; no resolution was put into writing, nor was any entry as to the proposal made on the file of proceedings. A resolution for adjourning the meeting to the 18th of January was then put, and carried by a majority of eight to three in number, and £188 to £78 in value. This resolution was reduced into writing, and signed by the assent-

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1875
Ex parte TILL.
In re RATCLIFFE.

ing creditors. At the adjourned meeting, which was attended by a somewhat larger number of creditors, the debtor renewed his offer of a composition of 2*s.* 6*d.* in the pound, and it was accepted by a majority in number and three-fourths in value of the creditors present in person or by proxy, and this resolution was confirmed at the second meeting on the 30th of January. On application being made to the Registrar to register the resolution, he refused to do so, on the ground, as stated in his certificate, "that the sense of the first meeting, duly summoned for the 10th of January, 1875, and competent to decide the matter, was taken, and was adverse to the resolution for a composition of 2*s.* 6*d.* in the pound, and that therefore it was not competent for the minority of creditors afterwards to adjourn the meeting, nor for any one again to propose that a composition which had been already rejected should be affirmed or accepted." On appeal to the County Court Judge the Registrar's decision was affirmed. *Ratcliffe* appealed to the Chief Judge, who reversed the decision (1).

Till, a dissenting creditor, appealed.

(1) 1875. April 26. W.N. (1875) 83.

SIR JAMES BACON, C.J.:—

I cannot attend to the argument which has been addressed to me on behalf of the Respondent. No doubt it is a consideration entitled to great weight, that there may be collusive proceedings under these liquidation meetings. But the law is strong enough to deal with such proceedings when they take place. The present case stands thus: There is a written resolution on the file, signed by the proper majority, to adjourn the first meeting. It is said that a previous offer of a composition made by the debtor was rejected. But if this is not in the form of a written resolution, I am unable to attend to it. The Registrar, in his certificate, says that the sense of the first meeting was adverse to the composition; there is not a word about a resolution. The certificate gives me no reason for believing that there ever was any resolution on the subject. Even if the Registrar had said that there was a resolution, still, as it is not in writing, the law does not allow me to take any cognisance of it. Then there is on the file a resolution in writing, duly signed, of which I am bound to take cognisance. There is on the file one resolution, and one only, the resolution to adjourn, to which I can attend. The recorded sense of the meeting is, upon the only evidence before me, only one way. A resolution to adjourn the meeting was duly passed, and at the adjourned meeting a valid resolution to accept the composition was passed, and it was duly confirmed at the second meeting. The order refusing the registration must be discharged, and I must direct that the resolution accepting the composition be registered.

Mr. *E. C. Willis*, and Mr. *Northmore Lawrence*, for the Appellant:—

An affirmance of the order of the Chief Judge would open the door to fraud. The sense of the first meeting was taken with regard to the debtor's offer, and it was not accepted by the proper statutory majority. That offer was then at an end.

Rule 275 of the *Bankruptcy Rules*, 1870, does not govern a case like the present, but the observations in *Ex parte Cobb* (1) are applicable.

Rule 275 evidently applies only to resolutions which are duly carried and have to be taken in for registration. It is only a resolution which is carried which would be signed by the statutory majority. The Registrar's certificate shews what took place, and there is no conflict in the evidence as to the rejection of the offer.

Mr. *Bagley*, for the debtor:—

The only question before the Court is, whether the grounds given by the Registrar are sufficient.

[The LORD JUSTICE JAMES:—Are not all grounds open?]

I submit not, for by Rule 295 his grounds are to be stated. The affidavit which has been made by the Registrar shews that it was admitted before him that the question of accepting the composition was not regularly put to the meeting.

[The LORD JUSTICE JAMES:—I do not blame this gentleman for making an affidavit; but his doing so must not be made a precedent, for it is not desirable that a judicial officer should make an affidavit as to what takes place before him; his doing so lowers the dignity of his office, it is as if the Court would not credit his simple statement.

The LORD JUSTICE MELLISH:—Certainly, a judicial officer ought not to make an affidavit as to matters before him.]

Rule 275 precludes the Court from taking notice of a resolution not reduced into writing and signed. It would be most dangerous to allow discussions before the Registrar as to matters of

(1) Law Rep. 8 Ch. 727.

L. JJ. 1875 *Ex parte* TILL. *In re* RATCLIFFE.

which there is no trace on the file of proceedings: *Ex parte Pooley* (1). It is desirable to give creditors ample power of adjournment, that there may be opportunity for full investigation.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Registrar, which was affirmed by the County Court Judge, ought not to have been reversed. There is a fallacy in the way in which the 275th rule has been treated. That rule does not apply to resolutions for adjournment, but to resolutions for liquidation or composition. It appears to me, therefore, that the resolution for adjournment, which is the first matter with which we have to deal, is not to be dealt with according to that rule. There is no provision in the rules as to adjournment. It is urged, however, that a power of adjournment is essential to a meeting. I agree with that proposition, supposing the resolution to be come to *bonâ fide*. But it is not *bonâ fide* for a majority which is not sufficient to pass a resolution for composition to pass a resolution for adjournment, when it has been ascertained that a resolution for a composition which has been proposed cannot be passed. When the sense of the meeting has been ascertained the meeting is over, and the power of adjournment is gone. The Registrar, therefore, in my opinion, was right in considering the resolution for adjournment invalid. The chairman ought to have recorded what took place, for the sense of the meeting was taken, but his omission to do so cannot render the adjournment valid.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The Chief Judge appears to have thought that because under Rule 275 a resolution for liquidation or composition can be proved only by a writing duly signed, the production of a writing so signed is conclusive as to the validity of the resolution, and that it is not competent to any one to allege that it is not binding, on the ground that it had been rejected by a previous meeting. But though the carrying a resolution for liquidation or composition can be proved only in this way, I think that

(1) Law Rep. 7 Ch. 519.

the rejection of such a resolution may be proved in any other way. If an adjournment under circumstances like those of the present case is allowed, this result will follow: as soon as it is ascertained that a resolution for composition cannot be carried, but that there is present a majority in favour of the debtor, it will be proposed to adjourn the meeting. I am of opinion that in the present case the sense of the meeting was taken, and that this having been done the meeting was at an end and could not be adjourned.

Solicitors: Messrs. *J. & F. Needham;* Mr. *A. H. Crowther.*

Ex parte GENERAL SOUTH AMERICAN COMPANY. *In re* YGLESIAS & Co.

Bill-holder—Doctrine of Ex parte Waring—Double Insolvency.

M., a foreigner, drew a bill on *Y.*, which was accepted, and remitted a bill of exchange to cover it. Before the acceptance became payable *Y.* filed a petition for liquidation, and the remittance came in specie to the hands of the receiver appointed in the liquidation. Shortly afterwards resolutions were duly registered for accepting a composition payable by instalments. *M.* was also insolvent, and had, since making the remittance, entered into a composition with some of his creditors, but had not made any cession of his property, and remained liable to be sued on the bills. He was indebted to *Y.* on the account between them beyond £2000:—

Held, that as *M.*, though unable to pay his debts, was liable to be sued, was free to deal with his property as he pleased, and was not subject to the jurisdiction of any Court, the doctrine of *Ex parte Waring* (1) did not apply, and that the holder of *Y.*'s acceptance could not claim payment out of the remittance.

THIS was an appeal by the *General South American Company* from an order of Mr. Registrar *Pepys*, sitting as Chief Judge.

On the 9th of April, 1874, *Madinya & Co.*, of *Guayaquil*, drew on *Yglesias & Co.*, of *London*, a bill of exchange for £2000 payable ninety days after sight to the order of the *General South American Company*. This bill was presented for acceptance on the 13th of May, was accepted, and became due on the 14th of August, 1874.

(1) 19 Ves. 345.

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On the 24th of June, 1874, *Madinya & Co.* wrote to *Yglesias & Co.* as follows:—"Your favour of the 16th of May has come to hand advising us that you have accepted our draft for £2000, ninety days' sight, order of *General South American Company*, for which please accept our thanks. To cover for your acceptance in time, and not having been able to find bills on *London* at any price, we have taken the inclosed 52,000 francs, at ninety days' sight, on Messrs. *Chavez & Co.*, of *Paris*, which we indorse to you."

On the 27th of July, 1874, *Yglesias & Co.* suspended payment, and on the 29th filed a petition for liquidation. On the 31st Mr. *Turquand* was appointed receiver and manager. On the 24th of September a resolution was passed for accepting a composition of 3*s.* 4*d.* in the pound, payable by instalments, which resolution was afterwards duly confirmed and registered.

The bill for 52,000 francs arrived after the appointment of a receiver, and *Turquand* received the proceeds. The bill for £2000 was presented for payment by the holders, the *General South American Company*, when it became due, and was dishonoured.

On the 15th of October, 1874, *Madinya & Co.* executed a deed of composition with their creditors, to which a number of creditors named in a schedule were parties, being a deed of covenant to pay in each month a sum equal to £5 per cent. on the amount of the scheduled debts till the debts, with interest at 6 per cent. per annum, had been paid; the creditors agreeing to take no proceedings so long as the monthly instalments were duly paid. The *General South American Company*, who were large creditors of *Madinya & Co.*, were not parties to this deed, and had not acceded to it. It was deposed to by a member of the firm of *Yglesias & Co.* that, independently of the bill for £2000, *Madinya & Co.* were indebted to *Yglesias & Co.* in more than £2000, and that he believed that notice of a claim by *Yglesias & Co.* for payment to *Yglesias & Co.* of the proceeds of the 52,000 francs bill had been given to *Madinya & Co.*, and that they did not oppose it.

The *South American Company* applied to have the proceeds of the 52,000 francs bill paid to them. The solicitor of the applicants deposed to an interview with a member of the firm of *Madinya & Co.*, but did not state anything leading to the conclusion that *Madinya & Co.* desired the proceeds to be applied in payment of

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the £2000 bill. Mr. Registrar *Pepys*, on the 5th of May, 1875, refused the application, and from his order the present appeal was brought.

Mr. *Jackson*, Q.C., and Mr. *E. Cutler*, for the Appellants:—

The Registrar decided the case against us on the ground that the rule in *Ex parte Waring* (1) had never been applied except where there were two forced administrations.

[The LORD JUSTICE MELLISH:—Can the rule apply so long as either drawer or acceptor is liable to be sued on the acceptances?]

The principle of the rule is very clearly laid down in *Ex parte Smart* (2), and we submit that it applies in a case like the present. It would introduce great confusion to hold that there was any difference between composition and bankruptcy in this respect. The Legislature evidently intended composition to be a mere alternative for administration in bankruptcy: *Bankruptcy Act*, 1869, s. 126. As regards *Yglesias & Co.*, therefore, the case is the same as if they were bankrupt. Then *Madinya & Co.* are insolvent, and if we proceeded against them in *Ecuador* we should only get a dividend. The only way of adjusting the rights of the parties is to apply the remittances for the purpose for which they were sent, namely, paying the acceptances: *Powles* v. *Hargreaves* (3). The money is in the hands of an officer of the Court, and the Court will deal with it in a way which is right and just. *Bank of Ireland* v. *Perry* (4) supports our view.

Mr. *Linklater*, for the trustee.

Mr. *De Gex*, Q.C., and Mr. *Daniel Jones*, for *Yglesias & Co.*:—

Madinya & Co. were heavily indebted to *Yglesias & Co.*, and if solvent might have said, "Do not apply the remittance to this particular bill, but to the general balance." That *Madinya & Co.* are insolvent makes no difference; they have indeed compounded with some of their creditors, but they have done nothing to deprive themselves of the right of dealing as they please with their own property.

[They were stopped by the Court.]

(1) 19 Ves. 345.
(2) Law Rep. 8 Ch. 220.
(3) 3 D. M. & G. 430.
(4) Law Rep. 7 Ex. 14, 20.

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Mr. *Jackson*, in reply.

SIR W. M. JAMES, L.J. :—

The rule in *Ex parte Waring* (1), which was originally applied as between two bankrupt estates, has been extended to two insolvent estates which are being administered one in bankruptcy and one in Chancery, or one in bankruptcy and one in insolvency; but no Judge has ever expressed an opinion in favour of extending the rule to a case where, as in the present, one of the parties, though practically insolvent, is subject to no jurisdiction, and cannot be compelled to submit his rights to any Court. Here *Madinya* can say, "I gave a direction to *Yglesias* as to the application of the remittance, but I am master of that direction, I recall it, I am under no obligation to any human being not to tell *Yglesias* to apply that remittance in any way I please." In my opinion the rule cannot be extended to a case where there is a party whose estate is not under administration.

SIR G. MELLISH, L.J. :—

I am of the same opinion. The Court must take care not to do any act which would deprive a party not under its jurisdiction of any rights of property which he possesses. In a case where two insolvent estates are being administered by the Courts, no Court of justice allows the rights of the parties to be altered from what they were at the time when it undertook the administration. But where, though a party is insolvent, his property is not under the control of any Court, he has the ordinary rights of property, and the Court cannot interfere with any directions he may give about his property. If we, against the will of *Madinya & Co.*, were to say that these remittances shall be applied in a way which they do not direct, namely, in payment of the bills accepted for them by *Yglesias & Co.*, they never having pledged them to the bill-holders, we should be depriving *Madinya & Co.* of their ordinary rights of property, a thing which, in my opinion, we have no jurisdiction to do.

Solicitors: Messrs. *Nicholson, Nicol, & Son;* Messrs. *Abrahams & Roffey;* Messrs. *Linklater, Hackwood, & Co.*

(1) 19 Ves. 345.

Ex parte GOMEZ. *In re* YGLESIAS.

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1875
April 29, 30;
May 6;
July 1.

Appropriation—Remittances to cover Acceptances—Bill-holders—Double Insolvency.

G. was in the habit of drawing bills on *Y.* and of sending him bills to put him in funds to meet them. A separate account of these transactions was kept, styled "No. 1 account," and the letters inclosing the remittances directed them to be placed to *G.*'s credit in Account No. 1. Accounts were made out half-yearly. Each remittance was entered under the date when the bill came to hand, but if it became payable before the close of the account, *G.* was credited with interest for the interval between the day of its falling due and the close of the account. If it fell due after the close of the account, he was debited with interest for that period. If a remitted bill was dishonoured, *G.* was debited with the costs, and entries of principal and interest were made on the opposite side of the account so as virtually to strike the bill out of the account. *Y.* stopped payment, and made a statutory composition of 3*s.* 4*d.* in the pound with his creditors, including the holders of his outstanding acceptances for *G.* At the time of the stoppage if he was credited with only 3*s.* 4*d.* in the pound on these acceptances, the balance was in favour of *G.*, without taking into account a number of bills remitted by *G.* and still remaining in specie. *G.*, who was domiciled in *Spain*, shortly afterwards entered into some composition with his creditors, but its nature did not appear. The Registrar decided that the remittances remaining in specie belonged neither to the bill-holders nor to *G.*, but to *Y.* *G.* appealed, but the bill-holders did not:—

Held, that the remittances were appropriated to No. 1 account, and that, as *Y.* had been fully reimbursed all that he had paid or was liable to pay for *G.* on that account, the remittances remaining in specie belonged to *G.*

THIS was an appeal by *Gomez* from an order of Mr. Registrar *Pepys*, acting as Chief Judge, directing the receiver under a composition by *Yglesias & Co.* to hand over to *Yglesias & Co.* certain remittances from *Gomez*.

Gomez, who carried on business at *Malaga*, was in the habit of drawing bills to a large amount on *Yglesias & Co.* of *London*, on which he paid them a commission, and of remitting bills to them to enable them to meet the acceptances when they fell due. An account current was kept between *Gomez* and *Yglesias & Co.* in respect of these bill transactions, being the account referred to as No. 1 in the letters about to be stated. All other dealings between the parties formed the subject of a separate account, No. 2, to which it will not be necessary further to advert.

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The course of dealing between the parties as regards the bill transactions was shewn by the letters that passed, two of which were as follows:—

"*Malaga*, 8 July, 1874.

"Messrs. *J. R. Yglesias & Co., London.*

"Dear Sirs,

"Yours of the 1st inst. crossed by mine of yesterday, which I confirm is in conformity.

"I have drawn on you for

£600 } at 3 months' date order of *Banco de Castilla*, which you
£400 } will please accept to my debit in No. 1 account.

£1000

"I enclose first of exchange for £927 14*s.* 8*d.* at 60 days' sight on Messrs. *F. Huth & Co.* to my credit in the same account.

"I am, &c.,

"*R. M. Gomez.*"

"*Malaga*, 9 July, 1874.

"Messrs. *J. R. Yglesias & Co., London.*

"Dear Sirs,

"I confirm mine of yesterday, and have to hand your esteemed of the 22nd instant, which is in conformity.

"I inclose first of exchange for £100 at 3 months' date on *Wattengell Campbell* for my credit in account No. 1, and £28 6*s.* at 8 days' sight on *Sunderland* payable there (in *London*) to account No. 2.

"Yours, &c.,

"*R. M. Gomez.*"

Yglesias & Co. remitted to *Gomez* half-yearly accounts of the bill transactions made up to the 30th of June and the 31st of December. The plan on which these accounts were made up was as follows:—On the debit side of the account each bill drawn by *Gomez* and accepted by *Yglesias & Co.* was entered under the date of its acceptance. In another column appeared the time when the bill would become payable, and then in the next column the number of days between that time and the day to which the half-yearly account was made up. Interest at £5 per cent. for that interval was entered in a separate column, the entry being made in red ink if the

bill was not payable till after the close of the account, and in black ink if it was payable before. On the credit side of the account the bills remitted by *Gomez* were entered under the dates of their coming to the hands of *Yglesias & Co.* There was a column for the dates of their becoming payable, a column giving the number of days between the time of each bill falling due and the close of the account, and a column in which interest for that interval was entered, the entry of interest being in black ink if the bill fell due before the close of the account, and in red ink if it did not fall due till afterwards. In taking the balance, red-ink entries on the debit side were carried over to the credit side of the account, and red-ink entries on the credit side to the debit side. The following are instances of entries on the debtor and creditor sides of the account, the red-ink entries being marked *:—

1874.—DR.								£	*s.*	*d.*	£	*s.*	*d.*
April 7. To your draft at			37d/d	*Crooke Bros. & Co.*	July 1	*1	*0	1	1	500	0	0
	,,	,,		*Carlos Larias*	,, 3	*3	*0	3	3	400	0	0
,, 20.	,,	,,		*Bank of Malaga*	,, 16	*16	*2	3	10	1000	0	0
May 8.	,,	,,		*F. Velches*	Aug. 4	*35	*1	8	9	300	0	0

											CR.		
April 7. By your remittance at			3m/d	*J. C. Cole*	July 1	*1	*0	1	4	500	0	0
	,,	,,	15d/d	*Union Bank*	Ap. 25	66	4	19	6	350	0	0
,, 20.	,,	,,	3m/d	*C. O. McCullum*	July 11	*11	*0	9	1	300	0	0
,, 25.	,,	,,	30d/s	*Hunt & Co.*	May 28	33	1	2	7	250	0	0

If a bill remitted to *Yglesias & Co.* was dishonoured at maturity, then under the date of the dishonour sums were entered on the debit side for principal and interest equal to those which had been entered on the credit side in respect of that bill, so that the dishonoured bill was in substance struck out of the account, except that *Gomez* was debited with the costs of its being protested. The last of these half-yearly accounts was one sent on the 6th of July, 1874, made up to the 30th of June, from which it appeared that *Gomez* was indebted to *Yglesias & Co.* on that day in the sum of £39,516 1*s.* 8*d.* on the balance of account. It must, however, be observed that by far the larger portion of the acceptances of *Yglesias & Co.* included in this account did not become payable until after the 30th of June.

On the 27th of July, 1874, *Yglesias & Co.* suspended payment, and on the 29th they presented a petition for liquidation. On the

* The figures and amounts preceded by an asterisk represent the red-ink entries.

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31st Mr. *Turquand* was appointed receiver and manager. On the 24th of September a resolution was passed for accepting a composition of 3*s.* 4*d.* in the pound, and was afterwards duly confirmed and registered.

At the time of the stoppage there were outstanding bills drawn by *Gomez* and accepted by *Yglesias & Co.* to a large amount. It was not disputed that the composition was binding on all the holders of them, so that *Yglesias & Co.* were subject to no further liability than that of paying 3*s.* 4*d.* in the pound on them. If *Yglesias & Co.* had been credited in account with only the composition on these acceptances instead of their full amount, the balance would have been against them irrespective of bills remitted by *Gomez* to the amount of £5745 16*s.* 4*d.*, which came to the hands of the receiver, some of them being in the hands of *Yglesias & Co.* at their stoppage and some having arrived afterwards. The receiver recovered upon them £5545 16*s.* 4*d.* Of these, the remittances which arrived after the stoppage amounted to £2634 5*s.* 8*d.*, and came inclosed in letters from *Gomez* announcing bills for acceptance, which bills, of course, were never accepted, as *Yglesias & Co.* had stopped payment.

It was stated in an affidavit by a member of the firm of *Yglesias & Co.* that *Gomez*, towards the end of 1874, had made a composition of 4*s.* in the pound with his creditors; but nothing further appeared as to its nature.

Under these circumstances the contest arose who were entitled to the £5545 16*s.* 4*d.* The holders of some of the bills drawn by *Gomez* on *Yglesias & Co.* and accepted by them claimed a lien on the fund on the principle of *Ex parte Waring* (1). This claim was, on the 16th of April, 1875, rejected by Mr. Registrar *Pepys*, who at the same time made an order directing the sum in question to be paid over to *Yglesias & Co.* The bill-holders acquiesced in this order, but *Gomez* appealed.

Mr. *Cohen*, Q.C., and Mr. *W. F. Robinson*, for the Appellant:—

The bill-holders are not interested; the question is merely between the drawer and acceptor, both of whom are compounding debtors, but their estates are not under administration so as to make

(1) 19 Ves. 345.

Ex parte Waring (1) apply. We say that the remittances were specifically appropriated to cover the acceptances. There is no reason why they should not be thus appropriated to a particular account as they might have been to particular acceptances. *Gomez* might have taken up the bills accepted by *Yglesias & Co.*, and then claimed to have the remittances returned to him. *Yglesias & Co.*, by virtue of the composition, are only liable for 3*s.* 4*d.* in the pound on their acceptances; the case, therefore, is the same as if they were solvent, and the acceptances were only for the amount of the composition, and the balance on that footing being against them, *Gomez* is entitled to a return of his remittances remaining in specie. As to the drafts not accepted by *Yglesias & Co.*, it is against all honesty that *Yglesias & Co.* should keep the remittances which accompanied the letters giving notice of those drafts, since they were sent on the faith of the drafts being accepted.

[They referred to *Trimingham* v. *Maud* (2); *Bent* v. *Puller* (3); *Bolton* v. *Puller* (4); *Giles* v. *Perkins* (5); *Shepherd* v. *Harrison* (6); *Tooke* v. *Hollingworth* (7); *Ex parte Dumas* (8); *Ex parte Pease* (9); *Vaughan* v. *Halliday* (10).]

Mr. *De Gex*, Q.C., and Mr. *Daniel Jones*, for *Yglesias & Co*:—

We say that the remittances were not specifically appropriated to taking up these bills. If goods are shipped to a purchaser, and he accepts bills, there is no appropriation.

[The Lord Justice James:—There was no purchase here—only accommodation acceptances for which *Yglesias* charged commission.]

If a banker discounts short bills they cease to be short bills, and belong to his creditors, though they remain in specie. *Ex parte Pease* is cited against us, but the observations of Lord *Eldon* are in our favour if the difference of the circumstances is looked to. Throughout the account credit is given for the bills as soon as they arrive, interest being charged where the bills are not paid by the time the account is rendered. The bargain, we contend, was

(1) 19 Ves. 345.
(2) Law Rep. 7 Eq. 201.
(3) 5 T. R. 494.
(4) 1 B. & P. 539.
(5) 9 East, 12.
(6) Law Rep. 5 H. L. 116.
(7) 5 T. R. 215.
(8) 1 Atk. 232.
(9) 19 Ves. 25.
(10) Law Rep. 9 Ch. 561.

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this—*Gomez* drew upon *Yglesias* and sent him bills as an equivalent, not appropriating them to pay the bills, but sending them as a compensation for accepting. The direction to carry to account No. 1 does not constitute an appropriation; it is only a direction that the proceeds shall go in reduction of the balance of this account rather than the other. *Vaughan* v. *Halliday* (1) has no bearing on the case. *Trimingham* v. *Maud* (2) is distinguishable, for there is no evidence there of the same bargain as in that case. *Shepherd* v. *Harrison* (3) and *Giles* v. *Perkins* (4) do not bear on the case, and *Bent* v. *Puller* (5) and *Thompson* v. *Simpson* (6) are strongly in our favour.

[The LORD JUSTICE JAMES referred to *Inman* v. *Clare* (7).]

Mr. *Linklater*, for the trustee.

Mr. *Cohen*, in reply :—

As regards *Bent* v. *Puller*, it was a decision of a dry legal point; and Lord *Eldon* observes in *Ex parte Pease* (8) that Justice *Buller*, in *Tooke* v. *Hollingworth* (9), went out of his way to say that the rule is the same in equity, with which Lord *Eldon* did not concur. In the present case, though the bills remitted are entered when received, interest is calculated in a way which makes the account the same as if they had only been entered as cash when paid. I agree with the other side that *Yglesias & Co.* could discount the remitted bills; but I say that as long as they were in their hands *Gomez* was entitled to redeem them, and that is all we claim.

July 1. SIR W. M. JAMES, L.J., delivered the judgment of the Court:—

Gomez, a merchant abroad, was in the habit of drawing bills of exchange on *Yglesias*, a merchant in *London*, who accepted those bills for the accommodation of *Gomez*, in consideration of a com-

(1) Law Rep. 9 Ch. 561.
(2) Ibid. 7 Eq. 201.
(3) Ibid. 5 H. L. 116.
(4) 9 East, 13.
(5) 5 T. R. 494.
(6) Law Rep. 5 Ch. 659.
(7) Joh. 769.
(8) 1 Rose, 241.
(9) 5 T. R. 215.

mission of one per cent. Either contemporaneously with the letters announcing that the bills were so drawn, or afterwards, other bills were remitted by *Gomez* to *Yglesias*, in order to provide the latter with funds to meet the acceptances, and to keep him out of cash advances. The two letters which I am about to read shew the course of proceeding between the parties. [His Lordship read the letters of the 8th and 9th of July, 1874, from *Gomez* to *Yglesias*.] The account No. 1 was the account of the accommodation acceptances, and of the remittances made in respect of them. The account No. 2 was the account of all other dealings and transactions between them. The fact that there were these two accounts between the parties appears to us to be a fact of the utmost importance in the case, and, unless controlled by something else shewn by or to be inferred from the course of dealing between the parties, shews conclusively, in our opinion, that the remittances were sent exclusively for the purpose of taking up the accommodation acceptances as they became due, and appropriated for that purpose. It is suggested that the accounts kept by *Yglesias*, and periodically transmitted by him to *Gomez*, and accepted by the latter, shew that the remittances were received and treated by *Yglesias* as his absolute property, and that he had only to give credit for them as so much cash received. We are satisfied, however, on a careful examination of the account, that it had not and was not intended to have any effect in altering the legal relations between the parties, and the rights flowing from the fact that acceptances were given by *Yglesias* on the one hand, and remittances sent on the other hand to provide for those acceptances. The dates on which the debits were made on the one side, and credits were given on the other, appear to us to be a mere accountant's manipulation of figures for the purpose of shewing how the interest account would stand, on the hypothesis that every bill would be honoured when due.

It is not pretended that *Yglesias* became the purchaser of the remittances to him, or that he took them as absolute payment and discharge of so much money. On the contrary, when any of them were dishonoured, the amount and costs were placed to the debit of *Gomez*. It is suggested that *Yglesias* had full right to discount the bills the moment he received them. But that is always the

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case in these matters. It is never expected or understood that a banker or a man in *Yglesias's* position is to keep the things locked up in his drawer so long as he is going on and solvent. The mode in which he is to use the remittances for the purpose of putting himself in funds is for his discretion and judgment, and the right to interfere with them only arises (like the analogous right of stoppage *in transitu* or resumption of vendor's lien) when there is actual or imminent insolvency patent.

We start then with this, that *Yglesias* was liable as surety for *Gomez* on a large amount of acceptances, and on the other hand he had the remittances to meet, or provide *pro tanto* for, those acceptances. In that state of things *Yglesias* failed, and at the time of his failure there were in his hands remaining in specie a large amount of *Gomez's* remittances which had been so specifically appropriated. It appears to us, in accordance with principle and a whole current of authorities, that in equity (whatever might be the legal right of property in the bills, which it is not necessary to consider) *Gomez* had a right to take out of *Yglesias's* hands those remittances, subject to any lien of the latter in respect of the liability he had incurred. Now, with respect to the latter, he had made a statutory composition of 3*s.* 4*d.* in the pound, and it is not suggested that that composition is not, as between *Yglesias* and the bill-holders, a valid and effectual discharge, so that all he has paid, and all he is liable to pay for *Gomez*, is the amount represented by that composition, and *Gomez* remains liable on his drafts for the remaining 16*s.* 8*d.* in the pound.

It is stated that crediting *Yglesias* in account with only the 3*s.* 4*d.* in the pound, the balance is not in his favour, leaving the above-mentioned remittances wholly free; and it is not suggested that, if *Gomez* had actually paid or taken up the acceptances, paying the remaining 16*s.* 8*d.* in the pound, he would not be entitled to have the remittances given up to him if we assume, as we have held, that they were specifically appropriated.

It is, however, suggested that *Gomez* himself is in some sense insolvent; that he has not paid, and is not able to pay, the acceptances to the bill-holders. That cannot, in our opinion, give any right or equity to *Yglesias*, who, as between him and *Gomez*, is only entitled to reimbursement and indemnity, and he has been

fully reimbursed and is fully indemnified, no matter by what means that indemnity has been obtained or his liability discharged.

Gomez is, in our judgment, entitled, whether he is rich or poor, solvent or insolvent, to have back his remittances, to enable him, it may be, to make a like favourable composition in his turn with his creditors.

It is not suggested that the right of *Gomez* has been intercepted by the right of any trustee or assignee, or other like person, under anything in the nature of bankruptcy or *cessio bonorum*, or the like, under the laws of his country.

The view of the case which we have taken renders it unnecessary to dispose of another point which might have been of great importance in this case. It appears that of the remittances as much as £2634 were sent with letters announcing drafts for acceptance, and which were not accepted, having arrived after the stoppage. We think that there is very great ground for saying that the language and reasonings of all the learned Lords who advised their House in the case of *Shepherd* v. *Harrison* (1), would apply to this case, that from the course of dealing between the parties there would be implied that which would not be (according to mercantile courtesy and usage) said in so many words, viz., "I send you the remittances on the faith that you will accept the drafts." That would, no doubt, appear to be inconsistent with the decision of the Vice-Chancellor *Giffard* in *Trimingham* v. *Maud* (2); but it is to be observed that that decision was pronounced some years before the case in the House of Lords, and, further, that as a matter of fact, the Vice-Chancellor came to the conclusion that there was only one general account, and that the remittances were made on that general account. It is not necessary for any present purpose critically to examine that decision, but we are not sure that we can reconcile the premises and the conclusion in the judgment.

Something has been said about the rights of the bill-holders under the doctrine of *Ex parte Waring* (3). It appears that some

(1) Law Rep. 5 H. L. 116. (2) Law Rep. 7 Eq. 201.
(3) 19 Ves. 345.

L. JJ. 1875 *Ex parte* GOMEZ. *In re* YGLESIAS.

bill-holders did apply by their own summons, and had an adverse decision which has not been appealed from, and is now past appeal. There being nothing to shew that *Gomez's* property has been or is the subject of judicial liquidation, or that *Gomez* has obtained the benefit of a legal composition or discharge, there are not two estates within the meaning of *Ex parte Waring* or *Powles* v. *Hargreaves* (1), and no means, therefore, of applying the doctrine of those cases. The result, therefore, will be that the order of the Registrar will be discharged, and the money in question ordered to be paid to *Gomez*. *Yglesias & Co.* must pay the costs before the Registrar, and there will be no costs of the appeal.

Solicitors: Messrs. *Linklater, Hackwood, & Co.;* Messrs. *Druce, Sons, & Jackson;* Messrs. *Nicholson, Nicol, & Co.*

L. JJ. 1875 July 22.

Ex parte PRICE. *In re* LANKESTER.

Bankruptcy—Set-off—Life Assurance Company in process of Winding up—Estimated Value of Policy—Money advanced on Policy—Bankruptcy Act, 1869, s. 39.

A policy-holder in a life assurance company borrowed money from the company on his policy. Before the death of the assured the company was wound up, and an estimated value was put upon the policy. Afterwards the policy-holder filed a petition for liquidation, and a trustee was appointed. The official liquidators of the company proved against the estate of the policy-holder for the amount advanced to him, and the trustee claimed to set off the estimated value of the policy:—

Held, that there were no mutual debts or mutual dealings within the 39th section of the *Bankruptcy Act,* 1869, and that no set-off could be allowed.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice,* sitting as Chief Judge in Bankruptcy.

Dr. *Edwin Lankester* was the holder of four policies of assurance on his own life in the *English Widows Fund,* which was

(1) 3 D. M. & G. 430. 17 Jan 1083.

amalgamated with the *European Life Assurance Society*, for sums amounting altogether to £1049. In November, 1865, he borrowed £140 from the *European Society*, after the amalgamation, on the security of the policies.

On the 12th of January, 1872, the two companies were ordered to be wound up, and their affairs were afterwards referred to arbitration under the *European Assurance Society Arbitration Act*, 1872, and the Appellants, Messrs. *Price* and *Young*, were appointed by the arbitrator official liquidators.

Under this arbitration Dr. *Lankester's* policies were valued at £446 8*s.*, and dividends amounting to £66 19*s.* had been declared on this sum, being at the rate of 3*s.* in the pound.

On the 28th of March, 1872, Dr. *Lankester* filed a petition for liquidation, and on the 1st of May his creditors agreed to accept a composition, and a trustee was appointed.

Dr. *Lankester* died in the year 1874, and his estate was expected to pay a dividend of 10*s.* in the pound.

The Appellants sought to prove against his estate under the composition for £140 and interest, but the trustee claimed a right to set off against the demand the sum of £446 8*s.*, at which the policies had been valued, and to prove for the balance against the estate of the *European Society* under the arbitration. The Registrar allowed the set-off, and the official liquidators appealed from that decision.

Mr. *De Gex*, Q.C., and Mr. *Linklater*, for the Appellants:—

There is no set-off in favour of the trustee in this case. At the time when the winding-up commenced Dr. *Lankester* was alive, and there was no debt due from the company; it was possible that no debt would ever become due, for their liability was contingent on the policies being kept up and the premiums paid. Therefore, if the company had been solvent when Dr. *Lankester* filed his petition, it is clear that there would have been no set-off against the company; and the fact of the company being wound up makes no difference. The value of the policies is merely a sum which has been arrived at by valuation for the purpose of winding up the affairs of the company. There has been no

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mutual credit or mutual dealings within the meaning of the *Bankruptcy Act*, 1869, s. 39: *Parlby's Case* (1).

Mr. *Winslow*, Q.C., and Mr. *Finlay Knight*, for the trustee:—

The fact of the company being wound up makes all the difference as to the claim of set-off. It may be that before the winding-up there was no debt due on the policies, but they have now been valued under the 158th section of the *Companies Act*, 1862, and that being done, the amount constitutes a debt which can be proved against the company; and if it is a debt capable of being proved, it must be a debt capable of being set off against any proof by them: *In re Duckworth* (2). The words "mutual dealings" in the mutual credit clause, s. 39, of the *Bankruptcy Act*, are quite wide enough to include such a transaction as this.

In *Parlby's Case*, the arbitrator was deciding on what he considered equitable principles, and not according to the law of bankruptcy, by which the present case is governed.

SIR W. M. JAMES, L.J.:—

I am of opinion in this case that the official liquidators under the winding-up are clearly entitled to prove for the debt *simpliciter* against the estate of Dr. *Lankester*. There is no right of set-off under the *Companies Act*, except that of the common law right of set-off, which would be allowed in an ordinary action at law. That being so, according to my view there is no set-off against the claim of Dr. *Lankester's* trustee under the winding-up in favour of the liquidators. Nor, on the other hand, is the trustee entitled to a set-off in bankruptcy against the claim of the liquidators. The mutual credit clause in the *Bankruptcy Act*, 1869, enlarged by these words "mutual dealings," still requires that there must be something of an account to be taken of what is due upon the one side and what is due upon the other. In that sense there never was anything due from the insurance company in which an account could be taken. It is impossible to say what was due upon the policy when the winding-up commenced, any more than that on a subsequent occasion some valuation had been

(1) Reilly's Albert Arbitration Cases, 48. (2) Law Rep. 2 Ch. 578.

put upon the policy, and that a dividend had been ordered to be paid upon it under the winding-up. But that cannot make it a thing which was due by reason of mutual dealings and transactions between the parties, and you can by no possible construction of the clause bring this in as a debt due on the one side to be set off against a debt due on the other. It is simply that each party will prove for what he can. The proof in the one case will be under the winding-up on the policies, and in the other the proof will be in the bankruptcy upon the debt. When there is a dividend ascertained in both cases, I suppose one sum will be set off against the other.

SIR G. MELLISH, L.J. :—

I am of the same opinion. It is quite clear that if it had been a solvent company that had lent money to the bankrupt, and the company had never stopped or been wound up, and the company had come to prove for the debt due, the trustee never could have claimed a set-off. There would have been no cause of action, and no proof at all. It does not, in my opinion, make any difference that the company is being wound up. It appears to me that that fact does not bring it within the "mutual credit" clause. I apprehend that the value of the policies is not a sum due at all, but it is a sum which is arrived at under the winding-up for the purpose of regulating the proof of debts. But it never was a debt, nor is it a sum which ever, in the proper sense of the word, would become payable as for money due under the mutual credit clause; and I think, therefore, that the liquidators are entitled to prove for the full amount.

Solicitors: Messrs. *Mercer & Mercer;* Messrs. *Lewis, Munns, & Longden.*

L. JJ.
1875
July 29.

Ex parte COKER. *In re* BLAKE.

Bankruptcy—Liquidation—Injunction—Suit in Chancery—Debt based on Fraud—Revivor against Trustee.

2 Ch. D. 53.
8 Q.B.D. 457

A. filed a bill against *B.* praying that an agreement might be cancelled, and a sum of money paid under it repaid, on the ground of fraudulent misrepresentations by *B.* Before the suit came to a hearing *B.* became a liquidating debtor, and the suit was revived against his trustee. The trustee then applied to the Court of Bankruptcy for an injunction to restrain the suit in Chancery:—

Held, that the Plaintiff had a right to prosecute his remedy against the debtor personally in the suit, notwithstanding the proceedings in liquidation; and the injunction was refused.

The Court of Bankruptcy will not restrain proceedings in a suit or action to which the discharge of the debtor in bankruptcy would be no defence.

THIS was an appeal from a decision of Mr. Registrar *Roche*, sitting for the Chief Judge in Bankruptcy.

On the 7th of October, 1871, Mr. *E. H. W. Swete* signed a written agreement with Mr. *R. H. Blake*, who had been for some time practising at *Leamington* as a physician and surgeon, to purchase a share of his business, and to carry it on in partnership with him. *Swete* paid a premium of £1500 for this share in the business. Differences afterwards arose between them, and the partnership was dissolved; and in August, 1873, *Swete* filed a bill against his late partner, in which he alleged that he had been induced to enter into the partnership by the fraudulent misrepresentations of *Blake*, and praying that the agreement might be cancelled and the sum of £1500 repaid to the Plaintiff; and for an account of all money paid by the Plaintiff under the agreement.

The Defendant put in an answer denying the truth of the charges made against him; but before the cause came to a hearing the Defendant filed a liquidation petition, under which Mr. *F. Coker* was appointed trustee.

The suit having become defective by the institution of the

liquidation proceedings, the Plaintiff, on the 26th of January, 1875, obtained the usual order to revive against the trustee.

On the 15th of June the trustee applied to the Court of Bankruptcy for an order restraining the Plaintiff from taking any further proceedings in the suit. The Registrar refused the application, and the trustee appealed from this decision.

Mr. *Romer*, for the Appellant:—

The Plaintiff cannot now proceed against the debtor. By obtaining an order to revive against the trustee he has substituted the trustee for the original Defendant, and cannot prosecute his remedy against the latter.

[The LORD JUSTICE JAMES:—I know of no authority for that proposition.]

It is quite contrary to the practice of the Court. If a Plaintiff wishes to prosecute his remedy both against the bankrupt and his trustee, he ought to amend the bill, and make the trustee a co-Defendant.

No object will be gained by prosecuting the suit against the trustee. It will only cause expense to the estate of the debtor. The Plaintiff's claim is only a money demand, and the Plaintiff can prove it in the Court of Bankruptcy, which is quite competent to decide on the whole case: *Ex parte Gordon* (1).

Mr. *O. L. Clare*, for the Plaintiff in the suit:—

The suit having become defective by the vesting of the Defendant's estate in the trustee, it was necessary to revive it against the trustee; but the Plaintiff did not thereby lose his remedy in the suit against the debtor. The Plaintiff's demand was in respect of a debt contracted by fraud, for which the discharge of the debtor in the liquidation could be no discharge; and the Plaintiff is entitled to prosecute such a claim against the debtor personally, notwithstanding the proceedings in liquidation: *Ex parte Baum* (2). Even if the Court has jurisdiction to grant the injunction asked

(1) Law Rep. 8 Ch. 555. (2) Law Rep. 9 Ch. 673.

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for, this is not a case in which it ought to be done. The evidence is closed in the suit, and the trustee wishes to begin again in the Court of Bankruptcy, and adduce fresh evidence.

Mr. *Romer*, in reply.

SIR W. M. JAMES, L.J.:—

Having regard to the nature of the suit, in which, if he succeeds, the Plaintiff will be entitled to a personal remedy against the liquidating debtor, I am of opinion that the decision of the Registrar was right. We cannot restrain the proceedings against the debtor merely because the trustee has been made a party to the suit. The trustee need not incur any expense. If, on considering the matter, he does not think fit to take any part in it, he can let it go on against the debtor, and will not incur any personal liability. Whatever may be found due from the debtor in the suit may be proved for in the liquidation, and the debtor will remain personally liable for it. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is quite clear that the Court of Bankruptcy ought not to restrain any suit or action against a bankrupt to which the discharge of the bankrupt would not be a defence. That is the case in the present suit. The debtor is personally liable, and the suit ought not be stopped, although the trustee is a necessary party to it.

Solicitors: Mr. *H. R. Gill;* Messrs. *Cunliffe & Beaumont.*

COBHAM *v.* DALTON.

L. JJ.
1875
Aug. 2.

[1874 C. 163.]

Bankruptcy—Attachment—Breach of Trust—Bankruptcy Act, 1869, *ss.* 12, 49.

A trustee, who had been ordered in a suit to pay into Court an amount admitted to be due from him, and mixed with his own moneys, was adjudicated bankrupt:—

Held, that although the debt was one from which an order of discharge would not release him, still, as it was a debt proveable under the bankruptcy, he was, pending the bankruptcy proceedings, protected by the *Bankruptcy Act*, 1869, s. 12, from attachment for disobedience to the order.

THIS was an application for discharge of the Defendant from custody under an attachment for non-payment of money.

The Defendant was the executor and trustee of the will of *William Cobham*, and on the 14th of July, 1874, the usual order was made on summons for the administration of the estate. The Defendant brought in accounts shewing a balance of £91 16*s.* 2*d.* due from him. On the 5th of June, 1875, he was ordered to pay into Court, on or before the 30th of June, that sum, with £2 17*s.* 10*d.* for interest, making £94 14*s.* It appeared that the sum due from him had been mixed with his own moneys.

On the same 5th of June the Defendant was adjudicated a bankrupt. The money not having been paid into Court, the Plaintiff, on the 16th of July, applied *ex parte* to the Master of the Rolls, and obtained leave to issue an attachment. On the 30th of July the Defendant passed his last examination, and, after leaving the Court, went into an inn for some refreshment, and was arrested there under the attachment. The inn was stated to be near *Quality Court*, in *Chancery Lane*, and so not upon the most direct route from *Portugal Street* to the station at *London Bridge*, by which the Defendant had to go home. The Defendant applied to be discharged. The application was made to the Master of the Rolls, just before His Honour rose for the Long Vacation, and was refused, with the understanding that there was to be an appeal. The costs were left to be dealt with on the appeal.

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Mr. *E. C. Willis*, for the Appellant:—

The 12th section of the *Bankruptcy Act*, 1869, protects a bankrupt from all proceedings *in personam* in respect of a proveable debt, for there is no remedy *in personam* under the Act to which the words "in manner directed by this Act" can refer, except sects. 86 and 96, which have no bearing on a case like the present. This was a proveable debt, and though by virtue of sect. 49 the order of discharge will not release the bankrupt from it, that does not take away his right to interim protection during the bankruptcy. The case stands on the same footing as *Lees* v. *Newton* (1), a case under the old law. Moreover, the bankrupt was privileged from arrest on the ground of his being on his way home from Court.

Mr. *Dyne, contrà*:—

Under the 13th section the Court can allow any proceedings to go on.

[PER CURIAM:—That only applies to the Court of Bankruptcy.]

It cannot have been intended that the provisions of the *Debtors Act*, 1869, should be overridden in this way by an Act which came into operation at the same time, and was evidently intended to be read in connection with it.

[He referred to *Ex parte Dempsey* (2) on this point.]

SIR W. M. JAMES, L.J.:—

13 C.L.D. 166

I think that the debtor is entitled to be discharged from custody. I do not see how to escape the effect of the words of the 12th section of the *Bankruptcy Act*, "where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by this Act." This clause seems to have been introduced in substitution for the old provisions as to protection, and prevents any individual creditor from interfering with the bankrupt or his property during the bankruptcy. When the order of discharge has been obtained, or the bankruptcy has been closed, the right of creditors whose debts are not barred to the future assets accrues,

13 C.L.D. 166

(1) Law Rep. 1 C. P. 658. (2) Law Rep. 8 Ch. 676.

the creditors whose debts are barred having lost all remedy. When that time arrives the creditor whose debt is not barred will have a right against the debtor's property, independently of the bankruptcy, and may resort to his remedy against the person in order to enforce it. That may be the reason why the 12th section is framed as it is, but whatever the reason may be, we do not find that the Act has directed any way in which, pending the bankruptcy, a creditor whose debt is proveable can have any remedy against the property or person of the bankrupt. I am of opinion that the debtor, therefore, is entitled to be discharged, and I am disposed to think that he would also have been entitled to have the attachment discharged, on the ground that he was privileged from arrest while returning from the Court.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The 12th section is in very plain terms, and provides that no creditor whose debt is proveable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of it, except in manner directed by the Act. Now, though this is a debt from which the order of discharge will not release the bankrupt, it is clearly a debt proveable in the bankruptcy, and it would require strong reasons to make us depart from the plain terms of the section. It is not at all clear that the Legislature did not expressly intend the result at which we arrive. The creditors whose debts are of such a nature that the bankrupt is not released from them by the order of discharge, have no preference against his estate in bankruptcy; all property that comes in till he has obtained his discharge is divided among all his creditors equally; it is not till the order of discharge that these particular creditors have any rights different from those of the other creditors against the bankrupt's property. Now arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged. It was therefore not unreasonable to say that while the property of the bankrupt remains divisible among all his creditors, a creditor of this particular description shall have no power of arrest, since payment cannot be compelled. But as soon as the order of discharge has been obtained, then, as the Act says

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that a debtor is not released from a debt of this description, the creditor can enforce his remedy against the after-acquired property, or the person of the debtor. This is advantageous to the creditor; he gets the same remedy as the other creditors in bankruptcy, and has a further remedy after the order of discharge. This is not unreasonable, and it appears to me the true construction of the Act.

Solicitors: Mr. *W. J. Foster*; Mr. *J. Croft*.

L. JJ. 1875 Aug. 5.

In re DEERE.

Arrest of Debtor—Attachment by Common Law Court—Application for Discharge to Court of Bankruptcy—Debtors Act, 1869, *s.* 5—*Bankruptcy Act*, 1869, *ss.* 12, 13.

A solicitor who had made default in payment of a sum of money due from him as solicitor was adjudicated bankrupt, and after his adjudication was arrested under a writ of attachment issuing out of the Court of Exchequer. He applied to the Court of Bankruptcy to order his discharge.

The Lords Justices, in the exercise of their discretion under the 13th section of the *Bankruptcy Act*, 1869, declined to interfere with the writ of attachment issued by the Court of Exchequer, and refused the application.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy.

On the 11th of November, 1874, Mr. Baron *Amphlett* made an order that Mr. *John M. Deere*, a solicitor, should forthwith pay to Mr. *T. Forgham* the sum of £48 12*s.*, being money received by Mr. *Deere* on behalf of Mr. *Forgham* while acting as his solicitor, together with the costs of the application.

Mr. *Deere* having failed to comply with the order, it was made a rule of Court.

On the 13th of February, 1875, Mr. *Deere* was adjudicated a bankrupt on the petition of another creditor.

In Easter Term, 1875, after the adjudication, Mr. *Deere* was served with a rule *nisi* why an attachment should not issue against him for non-compliance with the order, this being one of the payments which is excepted from the general abolition of imprisonment for debt under the *Debtors Act*, 1869.

The rule was made absolute before the end of the term, and on the 24th of July, 1875, Mr. *Deere* was arrested and lodged in the *Surrey* County Gaol. He applied to Baron *Cleasby* in Chambers to order his discharge, but the Judge refused to interfere with the order which had been made by the full Court.

Mr. *Deere* then made a similar application to the Court of Bankruptcy, which was refused by the Registrar, and he appealed from this decision.

Mr. *E. C. Willis*, and Mr. *Glenn*, for the Appellant:—

The precise question in this case was decided by this Court in *Cobham* v. *Dalton* (1), where the Court ordered the discharge of a bankrupt, who had been committed to prison under exactly similar circumstances. If that case had been decided before the present matter came before Baron *Cleasby*, he would probably have discharged the prisoner. The attachment was in the nature of a civil process to enforce payment of the debt: *Lees* v. *Newton* (2); *Rex* v. *Edwards* (3); and the Court of Bankruptcy has jurisdiction to discharge the prisoner under the 13th section of the *Bankruptcy Act*, 1869, which empowers the Court to restrain all proceedings against a bankrupt in respect of any debt proveable in the bankruptcy.

Mr. *Moulton*, for the creditor:—

The writ of attachment was not in the nature of a civil process to enforce the payment of money, but a *quasi* criminal proceeding instituted by the Court of Exchequer against its own officer for misconduct. The payment of the money would not entitle the debtor to a discharge, as in the case of a writ of *ca. sa.*, but he would have to make an application to a Judge in Chambers: *In re Newbery* (4). At all events, the power given by the 13th section of the *Bankruptcy Act*, 1869, is discretionary, and this Court ought not to decide this case on its merits, but ought to leave it to be decided by the Court of Exchequer. No injustice

(1) *Ante*, p. 655.
(2) Law Rep. 1 C. P. 658.
(3) 9 B. & C. 652.
(4) 4 A. & E. 100.

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will be done to the debtor, for he can take out a *habeas corpus* at any time, and apply for his discharge to one of the Common Law Judges.

Mr. *Willis*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that, this being the case of an attachment issued by a Court of competent jurisdiction against its own officer, the Court of Bankruptcy, in the exercise of its discretion under the 13th section of the *Bankruptcy Act*, 1869, ought not to interfere with the process of the other Court. The Appellant can apply to a Judge of that Court; there is nothing to prevent his suing out a *habeas corpus* at any time. It would not be right for us to interfere with what that Court has done, and to try the case on the merits. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. If we have any jurisdiction in this case, it is under the 13th section of the *Bankruptcy Act*, 1869, and that Act gives us a discretion in the exercise of our jurisdiction. I think it is not right that this Court should decide the question whether the attachment was issued for punishment or merely to enforce compliance with the order for payment of money. That question ought to be decided by the Court which made the order.

Solicitors: Messrs. *J. M. Deere;* Messrs. *Gamlen & Son.*

FERGUSON *v.* FERGUSON.

L. JJ. 1875 Aug. 4.

Attachment—Wilful Default—Ex parte Application—Irish Decree—41 *Geo.* 3, *c.* 90, *s.* 6; 32 *&* 33 *Vict. c.* 62, *s.* 4.

The *Act for the Abolition of Imprisonment for Debt* (32 & 33 Vict. c. 62, s. 4) extends to an application under 41 Geo. 3, c. 90, to commit for disobedience to a decree of the Irish Court of Chancery.

But a trustee who has been ordered to pay money which he had neglected to recover is not within the third exception of that section, and cannot be committed for default in paying the money.

Semble, an order for an attachment against a Defendant who is said to be within that exception ought not to be made *ex parte*.

Order of *Hall*, V.C., discharged.

A SUIT of *Ferguson* v. *Ferguson* was instituted in the Court of Chancery in *Ireland* for the administration of the trusts of a settlement. In this suit there had been a finding that the trustees of the settlement, *Hugh Ferguson*, the Plaintiff, and *B. D. Watlock*, one of the Defendants, did not obtain possession of the trust property, and did not receive certain debts which had been assigned to them, and that by reason of their neglect the trust funds had incurred a loss of £820. On the 22nd of January, 1875, a decree was made by the Court of Chancery in *Ireland* ordering *Hugh Ferguson* and *B. D. Watlock* to invest in New £3 per Cents the sum of £820, and to transfer the sum purchased to the Accountant-General of the Court in trust in the cause, within a time limited.

Hugh Ferguson duly invested £410, but *B. D. Watlock* had not within the time limited made any investment.

An exemplification of the decree was, by an order of the Court of Chancery in *England*, pursuant to the Act 41 Geo. 3, c. 90 (1), inrolled in that Court.

(1) 41 Geo. 3, c. 90, s. 6, provided that the Lord Chancellor should cause the order or decree of the Court of Chancery in *Ireland* to be inrolled, and "shall cause process of attachment and committal to issue against the person of the party against whom such order or decree shall have been made respectively in order to enforce obedience to and performance of the same as fully and effectually to all intents and purposes as if such order or decree had been originally pronounced in the said Court of Chancery in *England*."

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On the 22nd of July an *ex parte* motion was made before the Vice-Chancellor *Hall* for an attachment against *Watlock*, whereupon the Vice-Chancellor made an order for an attachment against *Watlock*, unless he should, on or before the 29th of July, shew good cause to the contrary.

On the 29th of July the Plaintiff moved before the Vice-Chancellor *Hall* to have the order made absolute, when *Watlock* appeared and shewed cause, whereupon the Vice-Chancellor ordered the motion to stand over until the 2nd of November.

The Plaintiff now, by leave, appealed against both the orders of the Vice-Chancellor.

Mr. *Horton Smith*, in support of the appeal:—

We had a right to an immediate attachment. It was contended that this case was within the *Act for the Abolition of Imprisonment for Debt* (32 & 33 Vict. c. 62), s. 4, but that Act does not apply to *Ireland*, and this is an Irish decree, and is governed by the old practice. Even if it is within that Act, the Defendant in this case comes under the third exception to sect. 4, as he is a trustee who has made default in paying money which he was ordered by a Court of Equity to pay.

[The LORD JUSTICE JAMES:—Have any such attachments been issued *ex parte?* I shall be very unwilling to commit any person under any exception in any Act without hearing what he has to say.]

At all events he is now before the Court: *Middleton* v. *Chichester* (1).

[The LORD JUSTICE JAMES:—But this Defendant has not spent or squandered the money. The Court ought not to commit where a trustee has not misappropriated the money, but has only been guilty of neglect in not getting it in. In *Evans* v. *Bear* (2) the other trustee had alone received the money.]

Mr. *C. H. Turner*, for *Watlock*, was not called upon.

(1) Law Rep. 6 Ch. 152. (2) *Ante*, p. 76.

L. JJ.
1875
FERGUSON v. FERGUSON.

SIR W. M. JAMES, L.J.:—

We had better at once dispose of this matter, and not leave it to stand over. In our opinion the original application ought to have been refused, and we now discharge both the orders with costs here and in the Court below.

Solicitors for the Plaintiff: Messrs. *Lanfear & Stewart.*
Solicitors for the Defendant: Messrs. *John Turner & Sons.*

Ex parte JONES. *In re* JONES.

L. JJ.
1875
Aug. 5.

Execution Creditor—Resolution for Composition—Delivery of Writ of Fi. fa. before Passing of Resolution—Bankruptcy Act, 1869, *s.* 126.

A resolution for composition has no retrospective effect so as to invalidate securities obtained by a creditor in the interval between the filing of the petition and the first meeting of creditors.

A creditor sued out a writ of *fi. fa.* and delivered it to the sheriff. Earlier in the same day the debtor filed a petition for liquidation or composition, and he afterwards obtained an injunction restraining the proceedings in the execution. At the first meeting of creditors a resolution was passed to accept a composition:—

Held (affirming the decision of *Bacon*, C.J.), that the creditor was entitled to proceed with his execution.

THIS was an appeal from a decision of the Chief Judge affirming an order of one of the Judges of the *Liverpool* County Court.

F. W. Jones was a printer at *Liverpool.* On the 24th of April, 1875, Messrs. *Sabel* commenced an action against him in the Court of Exchequer under the *Bills of Exchange Act*, 1854, and judgment in default of appearance was signed against him on the 8th of May for £55 10*s.* and costs. A writ of *fi. fa.* for £59 17*s.* 1*d.* was issued upon the judgment, and on the 10th of May, at 4 P.M., the writ was lodged with the *London* agents of the sheriff of the county of *Lancaster*. The county of *Lancaster* being a county palatine, it is necessary that a writ issuing out of one of the superior Courts at *Westminster* should be lodged in this way, and it is then sent to the sheriff's office at *Preston*, from which it is

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then issued for execution. On the same day, but at an earlier hour, *Jones* had filed a liquidation petition, notice of which was served on the execution creditors on the 11th of May. On the 13th of May a receiver of *Jones's* property was appointed, and on the same day the sheriff seized under the writ goods belonging to him. On the 19th of May, upon the application of the receiver, an order was made by the Judge restraining the creditors from further proceeding in their execution until the 27th of May, and this injunction was afterwards continued to the 14th of June. On the 26th of May the first meeting of the creditors was held, and it was resolved to accept a composition of 7*s.* 6*d.* in the pound in satisfaction of the debts due to the creditors. The resolutions were confirmed at the second meeting, on the 5th of June, and were afterwards registered. On the 15th of June the Judge, upon the application of Messrs. *Sabel*, discharged the injunction. From this order the debtor appealed to the Chief Judge, who affirmed the decision of the Judge. The debtor again appealed to the Court of Appeal.

It appeared that Messrs. *Sabel* attended at the first meeting of creditors in respect of another debt, and voted against the resolution for composition.

Mr. *Little*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The petition for liquidation having been filed before the delivery of the writ to the sheriff, there can be no question that if a resolution for liquidation had been passed by the creditors the effect would have been the same as in bankruptcy, and the execution would have been void as against the other creditors: *Ex parte Williams* (1). There is no reason why a resolution for composition should not have the same effect. Both proceedings are commenced by the same petition, and the same forms are used. The debtor has to make the same statement of his secured and unsecured creditors: *Bankruptcy Act*, 1869, s. 126, sub-ss. 3, 7; *Bankruptcy Rules*, 1870, rr. 92, 274, and Form 39. It was entirely in the power of the meeting of creditors to have a liquidation or a bankruptcy,

(1) Law Rep. 7 Ch. 314.

in either of which cases this creditor's security would have been destroyed. There is therefore no hardship in the same result being produced by a composition. If the decision of the Chief Judge is right, the debtor cannot know which creditors are secured and which are unsecured until he knows what resolution will be passed. If all securities are to be held good until the passing of the resolution, it will be in the power of some creditors to gain an advantage over others by obtaining a security between the filing of the petition and the day of the first meeting.

Mr. *De Gex*, Q.C., and Mr. *Crump*, for the execution creditors, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge was quite right. In order to take away a legal right from anybody it is necessary to shew express words in the Act, or clear implication. In this case the Respondents have, by due process of law, obtained a security on all the goods which the sheriff could seize. That was their legal right, and they have it still unless it can be shewn to have been taken away from them. If the petition had resulted in a bankruptcy or a liquidation, no doubt their right would have been lost, because the goods would have been, not the goods of the debtor, but the goods of the trustee. But in a composition the goods of the debtor do not cease to be his goods—that is of the very essence of a composition. It is said that the other creditors had power under the Act to deal with the Respondents' debt, and make them take a composition for it, and, therefore, that they had a right to affect their security for the debt. That would be a monstrous injustice. The debt is to be converted into a debt of so many shillings in the pound, and it is contended that the other creditors can not only make these creditors take a composition for their debt, but can make them give up their security. It is said that it is a mere matter of words, that bankruptcy, liquidation, and composition mean really the same thing, and that the creditors might have decided on bankruptcy or liquidation, in which case the security would have been destroyed. But that would have only

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resulted from the power of the other creditors to compel the Respondents to take their rateable share of the assets. That is very different from saying you must give up your security and accept what we think it fair to take from the debtor. I think the decision of the Chief Judge was right, and the appeal must be dismissed with costs. It does not seem to me that our decision will produce such important consequences as the Appellant suggests; for there are not likely to be many cases in which a creditor obtains a security between the filing of the petition and the first meeting of creditors.

SIR G. MELLISH, L.J:—

I am of the same opinion. The simple ground of my decision is that there are no words in the Act to take away the security from the creditor. In bankruptcy or liquidation it would have been taken away by the relation back of the title of the trustee. But there is no such relation back in the case of composition. The 126th section of the Act says that the composition shall be "binding on all the creditors whose names and addresses and the amounts of whose debts were shewn in the debtor's statement." That cannot mean that it shall be binding so as to destroy any securities which they may have. In bankruptcy or liquidation all securities obtained before the act of bankruptcy remain untouched. In the case of composition there is nothing to distinguish securities taken before the filing of the petition and those subsequent to the petition but before the first meeting of creditors. In the present case the security was binding as against the debtor at the time when the resolution was passed, and there is nothing in the Act to affect the right so acquired.

Solicitors: Mr. *H. G. Field,* agent for Mr. *Etty, Liverpool;* Messrs. *Graham & Son.*

CLARK *v.* ADIE.

[1873 C. 204.]

L. JJ.
1875
June 22, 23, 29; *July* 17.

Patent—Combination—Sub-combination.

A patent for a combination of several improvements is not infringed by using a combination of some only of those improvements.

Decree of *Bacon*, V.C., reversed.

Lister v. Leather (1) observed upon.

THIS was a suit to restrain the Defendant from manufacturing and selling instruments for clipping horses, in violation of a patent acquired by the Plaintiff.

Many horse-clippers had been invented more or less like those which were the subject of dispute in this suit; the cutting apparatus in all of them being composed of two or more teethed metal plates or combs, with sharp cutting edges moving backwards and forwards in close contact, catching between the teeth the hairs of the horse, and so cutting them off. The motion of the plates or combs was given by a pair of handles working on a pivot-like shears or scissors. The patent on which the Plaintiff relied was taken out in 1869 by one *Grayson*. The specification described minutely the several parts of the instrument, and the studs, stems, friction-plates, washers, nuts, plates, and cutters to be used in it. The specification stated that no bearings were made dependent on screws, which were liable to get loose, but that the bearings were on stems of great strength. It also described a contrivance for shifting the handles so as to allow of the clipper being used at any angle to the handles, thus rendering it unnecessary for the person using the clipper to stoop in order to reach any part of the horse; also a contrivance for allowing the cutters to be easily taken out when they wanted sharpening. The claim was as follows:—

"I do not limit or restrict myself to the precise details and configuration of parts which I have expressed and shewn, as the same may obviously be slightly varied or modified without in any

(1) 8 E. & B. 1004.

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degree departing from the principles and objects on which it is based; for example, the angles of the cutters, their sizes and number, may be varied, and also the number of teeth in the comb, and the dimensions and strength of the apparatus may be increased or diminished according to the purpose for which it may be required; but what I claim and desire to be secured to me by the herein in part recited letters patent is, the general arrangement, construction, and combination of parts, whereby I am enabled to construct an apparatus for clipping or shearing horses and other animals in such manner that the apparatus may be adjusted to numerous angles or positions to suit the varying surface of the animal, and whereby the shearing or clipping may be regulated to the exact extent required without shaving the hair or wool too closely, and without injuring the animal, leaving a smooth surface without marks, the apparatus being capable of being taken to pieces and adjusted for sharpening or renewing the cutter bar, or for other purposes, all substantially as herein specified and shewn."

The Plaintiff *Clark* had invented several clippers, and had taken out a patent for one. He then, as he alleged, made improvements, but finding that he had been partly anticipated by *Grayson*, he bought *Grayson's* patent, not, as he alleged, for the purpose of making any clippers exactly like *Grayson's*, but because he wished to use a part of *Grayson's* invention in a new and much better clipper which he himself had invented. And in the clippers made by him he used certain fixed studs and adjustable friction-plates or washers and nuts, for the purpose of securing an accurate adjustment of the under-plate or comb and the upper-plate or cutter, and accurately determining the friction between the plates in a manner which he alleges to have been described and claimed in *Grayson's* specification. He did not, however, use or allege that he had used the contrivances for shifting the angle or for changing the cutter.

The Defendant *Adie* had made clippers, in which he used the same or nearly the same fixed studs, friction-plates, washers, and nuts; and the bill in this suit was filed to restrain him.

A great quantity of evidence was entered into, and the conclusions at which their Lordships arrived as to the other facts, and

as to the construction of the clippers, will be found fully stated in the judgment of the Lord Justice *James*.

The Vice-Chancellor *Bacon* made a decree for an injunction, and the Defendant appealed.

The *Solicitor-General* (Sir *J. Holker*), Mr. *Aston*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Lawson*, in support of the appeal:—

We say, in the first place, that we have not infringed *Grayson's* patent, and we also say that it is void. The object of *Grayson's* patent was clearly not this arrangement of studs and washers, which was merely incidental. The real objects were the arrangement of the handles, enabling the instrument to be used at any angle, and the arrangement for removing and sharpening the cutter, neither of which has been adopted by the Plaintiff or by any one else. If the Plaintiff relies on the arrangement of studs, stem, and washer which we use as being the object of *Grayson's* patent, then *Grayson's* patent is void, for such an arrangement has long been used by us and others with the very slight difference of screws for studs or stems. But the application of a fixed stud instead of a screw is a well-known contrivance, and cannot be the subject of a patent. Moreover, we say that *Grayson's* patent is bad, because in it he does not distinguish the new part from the old. But if *Grayson's* patent is to be maintained as a combination of new and old used for the first time, then we say that the patent is only good for the entire combination, and that we can use any separate part of it: *Foxwell* v. *Bostock* (1); *Parkes* v. *Stevens* (2); *Daw* v. *Eley* (3).

Mr. *Kay*, Q.C., Mr. *Fry*, Q.C., and Mr. *Everitt*, for the Plaintiff:—

There may be a patent for a combination of old inventions: *Murray* v. *Clayton* (4); *Cannington* v. *Nuttall* (5). And if we have a patent for a combination, no one can take and use more than one invention out of that combination without infringing the

(1) 12 W. R. 723.
(2) Law Rep. 8 Eq. 358.
(3) Law Rep. 7 Eq. 49.
(4) Ibid. 7 Ch. 570.
(5) Law Rep. 5 H. L. 205.

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patent: *Lister* v. *Leather* (1). It is exceedingly possible that the merit of the whole invention may be in the subordinate combination, but a patentee ought not therefore to lose the benefit of the invention: *Foxwell* v. *Bostock* (2). He must make use of other old inventions with his new combination. The fixed stem alone is a real improvement, and is distinctly described as such in the specification, and it is not necessary to repeat it in the claim. There is an essential difference between a fixed stem and a moveable screw, as screws are liable to get loose. There is no pretext for saying that the patent is merely for shifting the angle and changing the cutter. The fixed stems and the general arrangement are just as much parts of his patent, and are to be protected.

Mr. *Aston*, in reply.

July 17. SIR W. M. JAMES, L.J., now delivered the judgment of the Court:—

This suit, which is to restrain the alleged infringement of a patented invention of improvements in apparatus for clipping or shearing horses and other animals, has been brought under somewhat singular circumstances.

Clipping or shearing implements have for many years occupied the attention of inventors. This is not to be wondered at. The number of horses that have to be clipped, and the labour of clipping a horse from head to hoof, are so great that any invention which adds to the efficiency of, and diminishes the work in using, the clipper, is really a matter of great commercial value. Accordingly numerous patents have been taken out in this country for machines and improvements on machines for effecting this object, and there is a great amount of patent literature from *America* on the same subject which has been deposited in our patent office.

The Defendant *Adie* is one of the English patentees, having taken out two patents, one in 1866 and another in 1868. The Plaintiff *Clark* is also a patentee, having taken out a patent in

(1) 8 E. & B. 1004. (2) 12 W. R. 723.

1869. The Plaintiff *Clark* was, however, minded to take, and did take, a license to use *Adie's* patent, and there has been litigation between them in which *Adie* was Plaintiff and *Clark* Defendant. In this state of things *Clark* brought out a clipper which is, beyond all controversy, a far better instrument than anything that *Adie* had patented or even made, and apparently better than any other clipping machine before known. And *Adie*, acknowledging this, has openly manufactured machines in exact and avowed imitation of *Clark's*. Hence this suit.

Clark, however, has not made his new machine the subject of any patent. And the way he puts his case is this: "I had invented, or was inventing, improvements the same, or nearly the same, as those which are now to be found in my manufacture; but, thinking it right to look into what had been done by others, I found that my ideas had been so much anticipated by one *Grayson*, who had taken out a patent, that I abandoned the idea of taking out a further patent, and took an assignment of *Grayson's* patent from his trustee in bankruptcy. Having taken this, I introduced *Grayson's* invention into my clipper, as I lawfully might, and I have been followed by *Adie*, who has unlawfully done that which I alone could lawfully do." It is therefore as assignee of *Grayson*, and for the violation of *Grayson's* patent, that the Plaintiff brings his suit; and the questions between the parties must be determined in exactly the same manner and upon the same considerations as if *Grayson* had not assigned, and were bringing his suit against *Clark*.

There is another singularity in this case, that *Grayson's* patent, as such, has never been brought into use at all. He does not appear to have made or sold, and no one else appears to have made or sold, a complete instrument made according to *Grayson's* specification. The Plaintiff has not even produced a model of *Grayson's* complete instrument; but a witness for the Defendant has made, for the purpose of this suit, an instrument which he says he has carefully, faithfully, and to the best of his ability made according to the specification and drawings of *Grayson*, and which must be taken to be, and which I believe to be, practically and substantially accurate.

Now I have in my hands that machine and *Clark's* machine,

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and, except that which is of course common to every clipping apparatus (viz. that each contains a combination of a comb and a cutter fastened together, the cutter bar made to move over the comb plate), there is no visible similarity, and there is, on the contrary, a very visible and marked dissimilarity, as far as I am able to judge by merely looking at the two instruments. The claim of *Grayson* is in the most general terms, and it has obviously been so framed in order to escape the danger which might be lurking in some existing machine or some existing patent, if anything, or any part or parts, more definite or more limited had been claimed. [His Lordship then read the claim of *Grayson's* patent, as set out above, and said that it was obvious that *Clark's* instrument did not answer that description; and it certainly did not agree with *Grayson's* in the general arrangement, construction, and combination of the parts.] Nor is it so pretended; but it is alleged that, although the general arrangement, construction, and combination of parts have not been copied, there is a subordinate combination—part of the entire combination—which has been transferred from *Grayson* to *Clark*, and that, under the supposed doctrine of *Lister* v. *Leather* (1), the patentee of *Grayson's* combination is entitled to treat as an infringement the use of that subordinate combination. That subordinate combination is alleged to consist of and be made up thus: The cutter bar is made with an arch or convexity over the comb plate, so that but a very small part of the surface comes into contact, giving elasticity and diminishing friction. Instead of screws going through the cutter plate and fastened by a thread or two, which is all that can be obtained in the thin comb plate, all the bearings are taken from stems of great strength, which are fastened by nuts and washers. The fulcrum of the handle and the fastening stems are so arranged as that the line of motion of the cutter bar is exactly parallel to the line of the comb. The parallelism improves the cut and diminishes the labour. The elasticity is said to diminish, and the diminished friction does diminish the labour; and the substitution of stems with nuts and washers for screws keeps the machine in that permanent good order which is requisite for easy work, which latter object is also further promoted by the substitution of paral-

(1) 8 E. & B. 1004.

lelism of the motion for a motion not parallel, which had a wringing and disturbing effect upon what may be called the joining parts of the instrument. These results, and the means of producing them, are, it is said, to be found in *Grayson's* patent, and to have been transferred to *Clark*, and to constitute a subordinate combination, the appropriation of which is, according to *Lister* v. *Leather* (1), an infringement of the patent. The language of the Court of Queen's Bench in that case is as follows (2):—"We cite these cases at length because the principle in all is the same as that laid down to the jury in the present case, and they establish that a valid patent for an entire combination for a process gives protection to each part thereof that is new and material for that process, without any express claim of particular parts, and notwithstanding that parts of the combination are old." But to understand what is there said it is necessary to read the two cases which were cited immediately before that passage. One is *Newton* v. *Grand Junction Railway Company* (3), in which the Lord Chief Baron says: "It was argued that the same criterion is to be applied to the question of infringement as to that of novelty. But that is not so. In order to ascertain the novelty you take the entire invention, and if, in all its parts combined together, it answer the purpose by the introduction of any new matter, by any new combination, or by a new application, it is a novelty entitled to a patent. But in considering the question of infringement, all that is to be looked at is, whether the Defendant has pirated a part of that to which the patent applies; and if he has used that part for the purposes for which the patentee adapted his invention, and for which he has taken out his patent, and the jury are of opinion that the difference is merely colourable, it is an infringement." The other case cited is *Smith* v. *London and North-Western Railway Company* (4). The language of the Court is this: "Where a patent is for a combination of two, three, or more old inventions, a user of any of them would not be an infringement of the patent; but where there is an invention consisting of several parts, the imitation or pirating of any part of

(1) 8 E. & B. 1004. 3 Jur. N.S. 844
(2) Ibid. 1023. 3 Jur. N.S. 846.
(3) 5 Ex. 331, 334.
(4) 2 E. & B. 69, 76. 17 Jur. 1071, 1073

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the invention is an infringement of the patent. Suppose that a man invents a machine consisting of three parts, of which one is a very useful invention and the two others are found to be of less practical use, surely it could not be said that it was free to any person to use the useful part so long as he took care to substitute some other mode of carrying out the less useful parts of the invention."

The judgment in the Exchequer Chamber in *Lister* v. *Leather* (1) does not throw any light on the subject, as it merely adopts and confirms tersely and curtly the judgment of the Court of Queen's Bench.

Now, upon the authority of that case, it has been strongly contended before us, that whenever there is a patent for a combination that patent gives protection, not indeed to every distinct thing that enters into the combination, but to every combination, arrangement, and aggregate of two or more of those distinct things, even although such subordinate combination is not expressly or impliedly claimed in the specification.

This, in our opinion, is so startling a violation of every principle of patent law, that we doubt whether we could follow any authority short of the House of Lords in applying such a doctrine.

If a patent for a combination of several parts is really a patent, and gives really a monopoly for every combination of any two or more of those parts, then it follows from the first principle of patent law that if any conceivable combination of any two or more parts was old the patent would be bad.

On the other hand, if the patentees say, "No, we do not claim to protect every combination of those parts, but only those subordinate combinations or parts of the combination which are new and useful," then such a claim would be entirely inconsistent with the leading case of *Foxwell* v. *Bostock* (2), which we may be permitted to say is as good common sense as it is sound and intelligible law.

I had, as Vice-Chancellor, occasion to express my opinion on *Lister* v. *Leather* in the case of *Parkes* v. *Stevens* (3), and this

(1) 8 E. & B. 1004. (2) 12 W. R. 723.
(3) Law Rep. 8 Eq. 358; Ibid. 5 Ch. 36.

Court had occasion to deal with the principle of that case on two occasions in *Murray* v. *Clayton* (1).

Before referring to what was actually done in that case, I will state what we conceive to be the real principle which underlies that case of *Lister* v. *Leather* (2), and which reconciles it with the other cases and with general principles and common sense. A patent for a new combination or arrangement is to be entitled to the same protection, and on the same principles, as every other patent. In fact, every, or almost every, patent is a patent for a new combination. The patent is for the entire combination, but there is, or may be, an essence or substance of the invention underlying the mere accident of form; and that invention, like every other invention, may be pirated by a theft in a disguised or mutilated form, and it will be in every case a question of fact whether the alleged piracy is the same in substance and effect, or is a substantially new or different combination.

The question more often arises, perhaps, in the analogous cases of literary copyright. Every literary composition is a combination of phrases and words, and in a case of literary piracies the same question has to be put: Is it a theft or is it a new literary work, the result of real literary labour?

To recur to *Murray* v. *Clayton*, which, although a decision of the same Judges as are now sitting, is a decision of the Court of Chancery, we, in the first instance, held that, although the patent was for a combination, the infringement was made out by shewing that the alteration was colourable only, and that the Defendant's machine was in substance and truth the same thing as the invention of the Plaintiff. But in the second case (3), between the

(1) Law Rep. 7 Ch. 570.
(2) 8 E. & B. 1004.
(3) L. JJ. 1875. Mar. 3.

MURRAY *v.* CLAYTON.

SHORTLY after the injunction was granted against him, as reported (Law Rep. 7 Ch. 570), the Defendant *Clayton* obtained a patent for a new brick-making machine, in which he cut the clay into bricks upon a table, much as in the Plaintiff's machine; he then moved the bricks on to an end table, instead of a side table, as in the Plaintiff's machine, and by hand, instead of by machinery, as in the Plaintiff's machine. It appeared that the Defendant and others had for many years made clay into bricks by a mechanical arrangement for cutting it into bricks upon a table.

The Plaintiff moved to commit the Defendant for breach of the injunction. The Vice-Chancellor *Bacon* refused to

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same parties, we arrived at a different conclusion. There was in that machine (a brick-making machine) a moveable board on to which the bricks (or rather the lumps of clay to be burnt into bricks) were by the same motion which divided and formed the bricks transferred; and we could not find anything in the patent which did not include that as a part, and material part, of the invention, and we therefore held that a machine which left out that part was not an infringement. If, instead of a board, there had been substituted a moving web of canvas, the result would probably have been different.

The principle is really very plain, as it seems to us. A combination or accumulation of three improvements is a totally distinct thing from a combination or accumulation of two of them—as distinct as a partnership of *A.*, *B.*, and *C.* is from a partnership of *A.* and *B.* And if a man really wants to patent not only the whole

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make any order on the motion, and the Plaintiff appealed.

Mr. *Webster*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Melville*, for the Plaintiff.

Mr. *Fooks*, Q.C., Mr. *Aston*, Q.C., and Mr. *Carpmael*, for the Defendant.

THEIR LORDSHIPS were of opinion that the Defendant had succeeded in avoiding a breach of the injunction. The Plaintiff was under the difficulties of every patentee whose patent was valid merely as a combination. Their Lordships, in granting the injunction, had been of opinion that the combination of known methods of proceeding employed by the Plaintiff had produced a new result, or an old result on a better system, and that he had therefore succeeded in shewing an exclusive right to that combination. But the combination which he claimed, and on which he had succeeded, was a combination of all the parts of the machine, so arranged that the clay was, without the intervention of a human hand, forced past the wires on to a moveable board holding twelve or any convenient number of bricks, which could from time to time be removed. It was the whole combination of plate, wires, and moveable board which formed the meritorious invention. He might possibly have confined his claim to some smaller combination than the combination of the three parts; but the invention for which he had claimed was, perhaps in order not to endanger his patent, described as a combination of the three parts. The Defendant used a combination of only two of those parts with another part, in which the human hand was in an essential and material part of the process used to produce the same result. Their Lordships thought that the Vice-Chancellor's decision was quite right, and dismissed the appeal with costs.

Solicitors: Messrs. *Vallance & Vallance*; Messrs. *Wilson, Bristows, & Carpmael.*

but something less than the whole of what he calls "a new arrangement, construction, and combination of parts," he must clearly shew that he claims that something less—of course periling his patent if that something less is not a novelty.

But it appears to us that even if *Lister* v. *Leather* (1) were the true exposition of the law, and had the full meaning and extent for which the Plaintiff's counsel has contended, it would be impossible to apply that case to the case before us. Combination and subordinate, or partial combination, are terms really not applicable to such improvements in such an apparatus as that before the Court. The general arrangement, construction, and combination is not a combination in any sense except that in which every one of several improvements may be said to combine with every other in making the machine a better one. *Parva componere magnis :* take a screw steamship in which the whole locomotive apparatus is one which by means of fuel set on fire under a boiler full of water at one end sets in motion a screw at the other end. Improvements may be made in every part of that apparatus, but it would be absurd to talk of a combination of an improved steam generator, of an improved arrangement for economising the steam, and of an improved method of attaching and moving the screw.

So, here it appears absurd to talk of a combination of the means of adjusting the handle of the cutter with the other parts. And then, again, as to the supposed subordinate combinations, there is, no doubt, in *Grayson's* patent a combination of the teeth of the comb made parallel and cut like a musical-box comb, with the angular cutter made like that of a reaper, because they are combined to effect a clean, sharp cut. But there is no combination between them and the arched or convex cutter bar, or between them or the latter and the parallel motion on the strong fixed stems. They are all improvements, but they are distinct improvements for distinct purposes, as much as those in the case supposed of a marine steam-engine.

To examine particularly the things which are supposed to be taken from *Grayson* by *Clark*, the convex, or arched cutter bar, is really not to be found anywhere in the written specification, and

(1) 8 E. & B. 1004.

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although it may be found in the drawings, it was clearly no part of the invention which was present to the mind of the inventor, or, if it was, he has wilfully omitted to describe a material part of his invention. And it is found, so far as it is found in *Grayson's* patent, in immediate connection with the angular cutter and the non-angular comb teeth, neither of which is transferred to *Clark*. Again, the strong fixed stems cannot be brought into any conceivable sub-combination of parts. They have their own independent function of making the whole machine stronger, and less likely to get out of order.

Having carefully read and re-read the specification of *Grayson*, we are satisfied that the real substance of his invention was angular cutters moving in a line parallel to the straight comb teeth, with transferability of the handle, so as to suit different positions of the man clipping, and the division of the cutter bar into two parts, a thin plate with teeth fastened into a bolt above, so as to admit of the thin plate being taken out and replaced immediately.

None of these things are to be found in *Clark's* instrument, and it appears to us that it would be a *reductio ad absurdum* of any supposed principle, or rather dogma, in *Lister* v. *Leather* (1), to hold that *Grayson* could have maintained a suit against *Clark* for the resemblances, such as they are, between a combination or arrangement so strongly, so substantially, so really different as the latter is from that which is to be found in the former. As jurymen giving our verdict on that which is, after all, a question of fact, we find that *Clark's* clipper, and consequently *Adie's* clipper, is not a piratical appropriation of *Grayson's* invention, and consequently we hold that the Plaintiff's bill ought to have been dismissed with costs.

Solicitor for the Plaintiff: Mr. *H. Jarman.*

Solicitor for the Defendant: Mr. *J. H. Johnson.*

(1) 8 E. & B. 1004.

LYON *v.* FISHMONGERS' COMPANY.

L. JJ.
1875
July 20, 21, 30.

[1873 L. 113.]

Tidal River—Riparian Owner—Access—Right, Public or Private—Embankment —Thames Conservancy—20 & 21 *Vict. c.* cxlvii., *ss.* 53, 179.

16 C.L.D. 463

The owner of land on the bank of a tidal river has only a right of access to the river as one of her Majesty's subjects, and has not the same easements or private rights as those of the owner of land on the bank of an inland stream.

Under the *Thames Conservancy Act*, the conservators had power to grant to the owner of any wharf a license to make an embankment into the body of the river, and by sect. 179 the rights of owners of land adjoining the river were saved :—

Held, that the conservators had power to grant a license to embank, although the embankment would cut off all access to one side of the adjoining wharf, the right interfered with not being a private right, and not being saved by sect. 179.

Decree of *Malins*, V.C., reversed.

Appeal of V.C. Malins affirmed by H. of L. 1 App. Cas. 662 H. L.

WILLIAM LYON, the Plaintiff in this case, was the owner in fee of a wharf and storehouse near *Upper Thames Street*, called *Lyon's Wharf*. The south front of the storehouse was on the *Thames*, and faced towards the main stream of the river; the west front or side, for about forty feet of its length, was also on the *Thames*, but faced a small right-angled inlet or recess of the *Thames*, called *Winckworth's Hole*. The bottom of the inlet was formed by a wharf belonging to the *Fishmongers' Company*, about fifty feet in length, and called *Winckworth's Wharf*. On the west side of the inlet was a public wharf, which did not project into the river above ten feet from the line of the front of *Winckworth's Wharf*.

On the side of *Lyon's Wharf* towards the inlet there were stairs and doors in the floors of the storehouse; and the Plaintiff and his predecessor had for fifty years and upwards landed goods from barges on that side, and had been in the habit of mooring barges in *Winckworth's Hole*. The bed of *Winckworth's Hole* was left dry at low water.

The *Fishmongers' Company*, with the license of the Conservators

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of the River *Thames*, intended to form an embankment in front of *Winckworth's Wharf*, bringing it out to a level with the south front of *Lyon's Wharf*. This would of course entirely fill up *Winckworth's Hole*, and cut off all access of barges to the west front or side of *Lyon's Wharf*. The fine or sum which the *Fishmongers' Company* were to pay to the conservators for the license to make this embankment was £250; the damage to *Lyon's Wharf* would, as the Plaintiff alleged, amount to several thousand pounds.

The Plaintiff filed the bill in this suit against the *Fishmongers' Company* and the conservators to restrain them from making the embankment.

The conservators claimed a right to give a license to make this embankment under the *Thames Conservancy Act* (20 & 21 Vict. c. cxlvii.) (1).

The *Fishmongers' Company*, by their answer, denied the right of the Plaintiff to use *Winckworth's Hole*, as to which there had been disputes; but in the opinions both of Vice-Chancellor *Malins* and the Lords Justices the Plaintiff had the right to use it.

(1) 20 & 21 Vict. c. cxlvii.: The 2nd section of this Act created a corporation of twelve persons to be called Conservators of the River *Thames*. By sect. 50 all the interest of the City of *London* and of the Crown, in the bed and soil and shores of the *Thames* from *Staines* to *Yantlet Creek*, and to all encroachments and embankments on the shores, was vested in the conservators, on whom various duties as to the river were imposed.

By sect. 53: "It shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the River *Thames* a license to make any dock, basin, pier, jetty, wharf, quay, or embankment, wall, or other work immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this Act directed, and under, and subject to such other conditions and restrictions as the conservators shall think fit to impose."

By sect. 104, one-third of such consideration was to be paid to the Commissioners of Woods and Forests, and the remaining two-thirds was to be applied to the general purposes of the Act.

By sect. 179: "None of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this Act had never been made."

The Vice-Chancellor *Malins* made a decree for an injunction (1), and the *Fishmongers' Company* appealed.

(1) 1875. May 3. WN(1875)90

SIR R. MALINS, V.C., after stating the facts of the case, continued :—

The question depends upon the rights of the conservators. They are a body brought into existence by an Act of Parliament, and what they are or are not entitled to do entirely depends upon the powers conferred upon them by that Act of Parliament. That Act gives them very extensive powers, no doubt; many of them—most of them, I will assume—for the public benefit; for it is of the highest possible importance that that great highway of the nation, the River *Thames*, should be kept in the most perfect order both above and below *London Bridge*, and throughout the whole part of the river over which their jurisdiction extends, by keeping the locks in good order, by keeping the channels in good order, and by having good police on the river. They are the masters of the police, to make all regulations; and they are to do all that is necessary, except as restricted by the 179th section of the Act.

The great stress of the argument has been to ascertain whether the right of Mr. *Lyon*, of the interference with which he complains, is a public or a private right. I think it seemed to be conceded by the Plaintiff's counsel, as it is argued by the Defendants', that if that is a mere public right, then the powers of the conservators extend to the destruction of that right, it not being within the saving of the 179th section, and Mr. *Lyon* must then submit to what they do. The Legislature has authorized it to be done, and has not given him any compensation, and he must submit. But if, on the other hand, that which he claims is a private right, then it seems also to be conceded that, inasmuch as the 179th section prohibits interference with any private rights, his private right cannot be destroyed, and he has a right to the injunction for which he asks.

The question then is, whether this is a private or a public right? First, what is it that the conservators propose to do? or rather, what have they authorized the *Fishmongers' Company* to do? What the object of this may be, I do not understand; it is something more than has yet been explained to me; because what they propose to do, as I understand, is to throw out an embankment exactly in a line with the frontage of Mr. *Lyon's* wharf, leaving a space of forty feet of dry land, from the frontage of the *Fishmongers' Company's* wharf, before the river is reached. At present, barges can come to be filled and emptied by cranes from the Plaintiff's wharf and from the *Fishmongers' Company's* wharf; if this embankment is made, then the *Fishmongers' Company*, instead of having the barges directly under their own cranes, will no longer have that power of filling the barges. They will no longer have the power of lifting sacks, or barrels, or anything else from the barges immediately under their own cranes, but they will have to let them down upon this space of forty feet between the front of their wharf and the river. So that it appears that the *Fishmongers' Company's* wharf must be greatly deteriorated unless they can bring forward the frontage of their wharf, which is, I suppose, the object ultimately in view. Unless they can do that, this embankment is clearly to the disadvantage of the *Fishmongers' Company*. That which is true of the *Fishmongers' Com-*

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Mr. *Glasse*, Q.C., Mr. *H. S. Giffard*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Dundas Gardiner*, for the *Fishmongers' Company*:—

The powers given to the conservators are express, and authorize

pany's wharf will also be true of Mr. *Lyon's*, because Mr. *Lyon* has the advantage of having two sets of doors, one looking due south to the main stream of the river, and one set looking west to *Winckworth's Hole*, which, although not the main stream of the river, is just as much a part of it as if it had been—indeed in one sense it is—part of the main flow and part of the main stream—the water comes in, and ebbs and flows, and goes in there as freely as it does in any other part of the river. I asked the counsel for the Defendants, in the course of the argument, this, You say the opening of a door on the river is either a public right or it is not; if it is not a private right it must be a public right. I asked, Do you contend that the conservators of the river could make an embankment in front of the southern doors of Mr. *Lyon's* wharf, and thereby prevent his having barges coming up to be loaded and unloaded immediately in front of his wharf? That was a proposition so monstrous that counsel seemed rather to recoil from it, and they have not ventured to assert such a right as that. It is, in fact, conceded that such a right could not be exercised; and if it was attempted to be exercised, Mr. *Lyon* would be entitled to appeal to this Court for protection. Then I want to know what difference there is between a man's house or a warehouse—it is all the same; if he has a house with a front and a side door, both opening into a public highway, or both opening into the great highway of the *Thames*, what greater right could there be to stop up the side door than to stop up the front door? It would be the same with the front door as with the side door; the side door might be more valuable to him than the front door, a greater traffic might be carried on by it, and Mr. *Lyon* might be placed in this disadvantage, for aught I know: his traffic at the wharf—his business—might be so great that it might not be convenient at all times to load and unload at his front door, or circumstances might arise which might make it desirable for him to fill up the front part of his wharf, so that he could not get to his front door; he might find it more profitable to have his warehouse filled up in front, and do the loading or unloading at the side. If he found that advantageous to him, is not that a right which enables him to make his wharf more useful and more profitable? and if he finds it so, who is to say that taking that right away from him is not taking away a private right, that is, taking away something which is valuable to him? I have already pointed out what would be the effect of this upon the wharf of the *Fishmongers' Company* themselves. It is perfectly clear to me that unless they can advance their frontage, which I have no doubt whatever was in contemplation, this embankment will be injurious to them. Inasmuch as Mr. *Lyon* has now as complete a water frontage to the west as he has to the south, why is he to be deprived of the western water frontage, and to be thrown upon the southern frontage only? If the one is a valuable property, the other is a valuable property, and, for aught I know, the western may be even more valuable than the southern; but upon what principle

such an embankment: *Kearns* v. *Cordwainers' Company* (1); *Attorney-General* v. *Conservators of the Thames* (2). The Plaintiff has abundant access to the river from the front of his wharf, and can I come to the conclusion that the water frontage to the west is of no value whatever? If one is a private right, does it not necessarily follow that the other is a private right also?

If, therefore, there were no decision on the subject—if this were *res integra* altogether, and the question had never been decided before—I should come to the conclusion that the man who has a house opening upon a highway has a right to step from his house on to the highway; and whether the highway be a highway of solid earth or a highway on water seems to me to be perfectly indifferent, he has just the same right from the wharf or house on the bank of the *Thames* to step from his house into a boat, or, if he likes, into the water, if the water is not too deep for him and it suits his purpose; he has just the same absolute right to step from his own house into the waterway as he would have to step upon solid land from any house adjoining a public street into that highway. This is a highroad adapted for the purposes of a wharf. It is a highroad by which barges are brought to and taken from the wharf. They bring the barges up at high-water, and let them be there until they can conveniently load them; and as to all the argument I have heard about the inconvenience produced to the *Fishmongers' Company* and the conservators or police of the river, in case the privilege which Mr. *Lyon* has of using that water frontage is abused, there is abundant power for the conservators by their officers to prevent any such abuse. I am therefore of opinion, and I should have been of opinion if the case had never been argued before, that one waterway is just as much a public highway as the other; and I cannot accede to the argument in any way, that you may stop up one of a man's doors and drive him to the use of the other.

This is, then, in my opinion, clearly a private right, which existed in 1857, when that Act was passed. That it was not used to the same extent then as now is admitted; because it is stated, and I have not heard it disputed, that from 1826 to 1864 these three doors—that is, the large door to each floor of the wharf, from which, as we see constantly in passing along business places, goods are let down and hoisted up, did not exist; but there was a small door or window to the north of the lower door, to which there was a ladder or step, from which they did take things from boats and barges, carrying them up the steps through the smaller door, and thus to some extent, from 1826 to 1864, the use of this water frontage to the west was made available to the profit of Mr. *Lyon* and those who preceded him in title. Therefore, if user were necessary, which I am of opinion it is not, then it is shewn and admitted that this existed more than twenty years before the passing of the Act; but I am of opinion that it would not have been even necessary to prove the user, and it was not necessary to prove the continuous right of Mr. *Lyon* to use those doors and windows as he thinks

(1) 6 C. B. (N.S.) 388. (2) 1 H. & M. 1.

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does not want this side. No doubt private rights are reserved by the 179th section, but all depends on the meaning of the words. A man has no especial right to a highway because his land adjoins

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fit; and the fact that he did enlarge them in 1864 was only availing himself of the right that he had from day to day and every hour of his life—in fact, to use the water frontage whenever he should find it desirable to do so. If, in point of fact, that western front had never had any doors or windows, and had never been used at all, I think it is a case in which the Court would feel inclined to pay very little attention to the Plaintiff; and it probably would have refused to grant an injunction, leaving him to seek his remedy at law. But when I find it has been extensively used, and there is no question whatever that it is most valuable to Mr. *Lyon*, I think it is perfectly clear upon principle that the conservators have gone beyond their authority in thus interfering with what I am clearly of opinion is a private right, and not merely a public right, and is therefore expressly reserved by the 179th section.

Now, so far, I have treated this case as if there were no authority. What are the authorities? To my mind the authorities are all one way, in favour of Mr. *Lyon*. One of the cases much relied upon was that of *Rose* v. *Groves* (5 Man & G. 613). [His Honour then stated the facts of that case, and read the judgment of the Chief Justice *Tindal*, observing that it was a distinct decision that as the obstruction of the river prevented the public from going to a public-house, there was a private injury for which the Plaintiff was entitled to maintain his action. But His Honour thought that the case of *Metropolitan Board of Works* v. *McCarthy* (Law Rep. 7 H. L. 243) shewed this more distinctly, and that the judgment of Lord *Cairns* put the matter upon grounds which were peculiarly applicable to the present case, as there were in that case also two highways. Then came the question, whether a river frontage was a thing of private or of public right, and that question was distinctly decided in *Duke of Buccleuch* v. *Metropolitan Board of Works* (Law Rep. 5 H. L. 418), where the Duke of *Buccleuch* was held to be entitled to compensation for the loss of his water right. In this case, the right of letting goods down into barges was clearly a private right, and the Act of Parliament giving no compensation for the destruction of private rights most reasonably said that they were not to be interfered with. The case of *Attorney-General* v. *Conservators of the River Thames* (1 H. & M. [illegible] had been relied upon by both sides, part of the judgment being considered favourable to one side, and part to the other side. The Vice-Chancellor *Wood* seemed in that case to have assumed that it was a case in which private rights were not sufficiently protected to come under the 179th section. He seemed, however, to have been not very clear on the point, as in dismissing the bill he did not give costs. But on the question now to be dealt with, his opinion was very decided, though he did not give relief, because the property was not wholly destroyed. I am, however, unable to see a satisfactory distinction between a total destruction of right and a destruction which was all but total. In *Kearns* v. *Cordwainers' Company* (6 C. B. (N.S.) 388) the construction of the jetty in

(4 Sc 8 Jur N.S. 1103
(4 Sc 5 Jur N.S. 1216

the highway; he has merely an especial convenience. In one sense he has a right to go from his land to the highway, but that right is not a property. He has no more right over the piece of highway which adjoins his land than over any other piece of the highway. *Rose* v. *Groves* (1) has been misunderstood. No doubt the owner of *Lyon's Wharf* would make more use of this inlet than of any other part of the river, but he has no more right to use it than he has to use any other part of the river, or than any other of Her Majesty's subjects has to use it. This hole or inlet is merely a part of the river, and if the conservators have a right to enclose any part, they have a right to enclose this. If this claim is admitted, the 53rd section is useless, and the conservators could not give licenses to embank anywhere. The Act was for the general advantage of the river. Each wharfowner may in turn

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front of the wharf caused some degree of interference with the free passage of the river, but it did not block up the access to the Plaintiff's property. If it had been blocked up, or rendered inaccessible, I am perfectly clear that the Court of Common Pleas would have held that the case was within what Lord *Hatherley* said in the last-mentioned case. But although the jetty there might have caused some interference—and probably it was impossible to make any jetty which would not in some degree interfere with the navigation of the river—yet while the injury was only inflicted on the Plaintiff in common with the rest of the public, that would be no private injury, as it merely made the navigation of the river somewhat more difficult, and would not give a right of action. There having been no destruction of the right, that case has no application to the present case. The case of *Benjamin* v. *Storr* (Law Rep. 9 C. P. 400), which was stopping up of the highway by certain carts and waggons standing before the door of a private owner, does not seem to have any material application to this case, except as shewing that none of these rights on the part of the public could be exercised so as to obstruct or interfere with or materially injure private rights, unless there be Parliamentary power to do so. In this case there were no Parliamentary powers of interference with private rights, which were all expressly reserved. I am therefore of opinion that the conservators have gone beyond their powers, and I must regard the grant of this right as null and void; and anything proposed to be done under it by the *Fishmongers' Company* must be restrained.

[His Honour made a decree in favour of the Plaintiff according to the terms of the prayer, with the costs of the suit against the conservators, not including the costs of the evidence, and with the costs generally as against the *Fishmongers' Company*.]

(1) 5 Man. & G. 613.

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suffer, but will derive benefit from the general improvement of the river in straightening the shores, and the money paid will be applied to the general improvement of the river.

Mr. *Cotton*, Q.C., Mr. *Philbrick*, Q.C., and Mr. *Cottrell*, for the Plaintiff:—

No doubt in this case the Plaintiff has access to the river from another point; but if the Defendants are right, the conservators could cut off all access to a wharf; as, for instance, by allowing the Plaintiff to embank this very place, and so to shut out *Winckworth's Wharf*. This embankment is not done for the general improvement of the river, but merely for the advantage of the *Fishmongers' Company*. No doubt a sum of £250 has been paid to the conservators, and will be used for the improvement of the river; but the Plaintiff ought not to suffer such great injury for such a small benefit. There is no compensation clause in this Act, and unless the Court interferes the Plaintiff has no remedy or relief. It is clear that the works intended by the 53rd section are to project into the bed of the river and form the general line of wharf. This is not such a projection. The Plaintiff does not allege that this embankment will be a public nuisance, but that he, as a riparian owner, has a right to the use of the river, and is not by this Act deprived of that use, being protected by sect. 179. His right is not an easement, but is his property. He has a right to the accustomed flow of water to his land: *Metropolitan Board of Works* v. *McCarthy* (1).

In *Caledonian Railway Company* v. *Ogilvy* (2) it was held that the owner was not entitled to compensation; but that was merely because his access was not cut off. This is not overruled by *Duke of Buccleuch* v. *Metropolitan Board of Works* (3). The Plaintiff's right is not merely that of one of the public, for his right of landing goods at this wharf is a private right, and cannot be interfered with.

It is a startling proposition that under a local Act like this a man can have a right which has been enjoyed for perhaps 200 years taken away from him without any compensation and bestowed

(1) Law Rep. 7 H. L. 243. (2) 2 Macq. 229.
(3) Law Rep. 5 H. L. 418.

on his neighbour. The Plaintiff, as the owner of this close, has a right to have it bounded by the navigable river. No doubt the public and the *Fishmongers' Company* had a right of access to this hole; but it is clear that if the *Fishmongers' Company* had closed it with a chain, or had left a barge there too long, the Plaintiff would have a right of action against them, and this embankment is much worse. There is a distinction between a highway and a navigable river. On a highway the land has been given up by the owner for the use of the public, but on a river nothing has been given up, and the riparian owner has an absolute right to access: *Chasemore* v. *Richards* (1); *Macey* v. *Metropolitan Board of Works* (2); *Winterbottom* v. *Lord Derby* (3).

Mr. *Giffard*, in reply:—

Such a right as that claimed by the Plaintiff over a navigable river has never been recognised. The right of access to a tidal river is not incident to the land, but is the right of every one: *Chichester* v. *Lethbridge* (4); *Marshall* v. *Ulleswater Steam Navigation Company* (5).

The reason why an ordinary owner of land on the shore cannot embank is because he interferes with the navigation, not because he interferes with private rights. This right is subject to every change of the highway. On a stream the bed of the river belongs to the owner of the adjacent land, but on a tidal river it belongs to the Crown or its grantees. If the conservators proceeded to make an oppressive use of their powers, as by running out jetties at such angles as to cut off the intervening wharf, the Court might perhaps interfere; but that is not the case here.

July 30. SIR G. MELLISH, L.J., delivered the judgment of the Court:—

This was an appeal from a decree of the Vice-Chancellor *Malins*, by which he granted an injunction restraining the De-

(1) 2 H. & N. 168. (3) Law Rep. 2 Ex. 316.
(2) 33 L. J. (Ch.) 377. (4) Willes, 71.
(5) Law Rep. 7 Q. B. 166.

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fendants from putting up any embankment facing their property on the south side, and facing the Plaintiff's property on the west side, or doing any other thing whereby the Plaintiff's right of access to the river on the west side of his wharf directly from the river might be defeated, destroyed, or prejudiced.

The Plaintiff is the owner of a wharf called *Lyon's Wharf*, near to *Upper Thames Street*, bounded on the south side by the main course of the *Thames*, and on the west by an inlet from the *Thames*, which is part of the *Thames*, called *Winckworth's Hole*. The Defendants, the *Fishmongers' Company*, are the owners of another wharf, called *Winckworth's Wharf*, abutting on *Winckworth's Hole* towards the south, and the sole question to be determined is whether the Defendants are entitled, having obtained a license from the conservators, under the 53rd section of the *Thames Conservancy Act*, 1857, to fill up *Winckworth's Hole* and to extend their wharf to a line with *Lyon's Wharf*, which will necessarily block up the Plaintiff's access to the river from the west side of his wharf, or whether the Plaintiff's right of access to the river on the west side of his wharf is reserved to him under the 179th section.

There was very contradictory evidence as to the extent to which the occupiers of *Lyon's Wharf* had used the west side of their premises for the embarking and disembarking of goods prior to 1857; but we are of opinion that there was sufficient evidence of such user to rebut any presumption that the occupiers of *Winckworth's Wharf* had in any way acquired the exclusive right to embark and disembark goods from *Winckworth's Hole*, assuming that such exclusive right could possibly be legally acquired, and we think it must be taken to be established that the Plaintiff had, in respect of the west side of *Lyon's Wharf*, at the time when the *Conservancy Act* passed, the ordinary rights of the owner of a wharf on the banks of a navigable river.

7 Ap. Cas. 300

This, indeed, was not seriously denied, and the counsel on both sides agreed that if such an embankment as that proposed were made without the authority of an Act of Parliament, the Plaintiff would have a remedy by action at law or by suit in equity, but they differed as to what would be the ground of action or suit. The Defendants' counsel contended that the Plaintiff could main-

tain such an action solely because he would suffer a particular damage from the violation of a public right, and that, therefore, according to the decision of the Court of Common Pleas in the case of *Kearns* v. *Cordwainers' Company* (1), his right was not reserved by the 179th section. On the other hand, it was contended by the counsel for the Plaintiff that the owner of premises abutting on a navigable river where the tide flows and re-flows, has rights belonging to him as a riparian proprietor wholly distinct from the public right of navigation, by virtue of which rights he can maintain an action against any one who prevents the tidal water from flowing to his premises in the ordinary course of the tide, or who deprive him of his access to the river; and, that, secondly, whether this is so or not, the right of access to the river ought to be held to be a right reserved by the 179th section.

We have been unable to find any authority for holding that a riparian proprietor, where the tide flows and re-flows, has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide; and there are such obvious distinctions between the two cases that we are unwilling to hold that the rights of the one necessarily extend to the other. In the parts of rivers where the tide flows and re-flows, the soil between high-water mark and low-water mark and the soil in the bed of the river are *primâ facie* vested in the Crown, but the public are entitled to the rights of navigation and fishing and to use the shore, the property of the Crown, for the purpose of embarking and disembarking, and for other purposes auxiliary to their right of navigation and fishing. But we cannot find any authority to the effect that the riparian proprietor whose property terminates at high-water mark has any greater rights over the river or the shore between high and low-water than any one else except this: that the fact of his being the owner of private property immediately adjoining the shore of the Crown enables him to go on the shore for the purpose of embarking in and disembarking from vessels on the river at parts of the shore where other persons cannot get; and at high water, if the water comes up to his property, he can bring a vessel close up

(1) 6 C. B. (N.S.) 388.

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to his property, and so use his property as a wharf for the loading and unloading of goods.

These may indeed be most valuable rights, but they arise simply from the fact that the person claiming them owns land immediately abutting on a public navigable river, which he, as one of the public, is entitled to use for the purpose of navigation, and do not, as it seems to us, render it necessary to hold that a riparian proprietor has any rights over the river, or the shore of the river, beyond the rights of the rest of the public; and a man having a mere right of way, the narrowest possible, down to the water edge, has as much right as the owner of the most extensive riparian property to the reasonable use of any portion of the navigable river for the purpose of loading or unloading goods or embarking or disembarking passengers; and if a public way went down to the water edge, any one of the public using that would have the same right of using the stream.

The right to stop a carriage or waggon in the highway for the purpose of taking up and setting down, loading or unloading, is not limited to and has no necessary connection with frontage, *e.g.* the occupier of a back workshop has exactly the same rights as the shopkeeper in front. A coal barge in the *Thames* unloads at a wharf, but it loads from a collier in the pool, and it lies alongside the ship to load in exercise of precisely the same right as when it lies alongside the wharf to unload.

The only authority which was cited for the proposition that a riparian proprietor has such rights was the case of *Rose* v. *Groves* (1), and what was said by Lord *Hatherley* in the *Attorney-General* v. *Conservators of the Thames* (2), which, however, was entirely founded on the case of *Rose* v. *Groves*.

We do not think that the case of *Rose* v. *Groves* was a sufficient authority for the proposition it was cited to support. It was an action by the occupier of a public-house situate on the banks of a navigable river for stopping the access of his customers from the river by means of pieces of timber floating on the river. The declaration was ambiguously framed, so that it was difficult to tell whether the pleader intended to rely on the violation of a public right or of a private right. The right, as alleged, was not

(1) 5 Man. & G. 613. (2) 1 H. & M. 1.

traversed, the only plea being "not guilty;" but after a verdict for the Plaintiff a motion was made in arrest of judgment, so that the only question to be decided was, whether the declaration was good after verdict. All the Judges were of opinion that the declaration was good, upon the ground that it sufficiently alleged that the Plaintiff had suffered a particular damage from what was an indictable offence in a navigable river; and in *Kearns* v. *Cordwainers' Company* (1) Mr. Justice *Willes* states this to have been the ground of the decision, but some of the Judges in *Rose* v. *Groves* (2) do also express an opinion that the declaration might be supported on the ground that it sufficiently alleged a violation of a private right, the right alleged not being traversed; but they do not, as I understand them, express any opinion that if the right had been traversed it would have been proved. Chief Justice *Tindal* does, indeed, suggest that the pieces of timber might drift close to a bank where the water was so shallow that no boat could go there, and that that would not be a public nuisance.

Now we agree that if it be possible to prevent the riparian proprietor from having access from the river to his premises by an obstacle placed in the river which would not be a public nuisance, this would afford a ground for contending that there was such a private right as alleged. It seems to us, however, that any such obstruction must necessarily be a violation of the public right of navigation, and, therefore, a public nuisance. The public right of navigation, as is pointed out by Mr. Justice *Blackburn* in *Marshall* v. *Ulleswater Company* (3), includes a right of disembarking and coming on shore at any place where persons navigating a river have a right to come on shore; and, therefore, if there be an obstruction, although in shallow water, which prevents persons landing where they are entitled to land, that is a public nuisance. In *Rose* v. *Groves* the customers who were hindered or prevented from having access to the Plaintiff's public-house could not have brought an action on account of the obstruction, but surely they could have prosecuted an indictment to enforce their right of landing.

There are two cases in which the Courts of Common Law have

(1) 6 C. B. (N.S.) 388. (2) 5 Man. & G. 613.
(3) Law Rep. 7 Q. B. 166.

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had to consider the consequences of an obstruction which prevented persons from landing at a wharf where they were entitled to land. In the *Eastern Counties Railway Company* v. *Dorling* (1) the Plaintiffs and the Defendant were the owners of rival steamboats, and were entitled to use the same wharf at *Ipswich*, by the license of the wharfinger, to land and embark their passengers. The wharf could only be approached by the steamboats at high tide, and the Plaintiffs had placed a dummy in front of the wharf to enable them to land and embark passengers at all times of the tide. The action was in trespass against the Defendant for using the Plaintiff's dummy, and it was held that the Defendant was entitled to use the Plaintiff's dummy at high tide when the dummy prevented the Defendant's vessel from getting to the wharf, but not at low tide, when the vessel could not have got to the wharf even if there had been no dummy. A great number of pleas were pleaded, but they all depended on the public right of navigation, and nothing was said about any private right in the wharfinger. In *Marshall* v. *Ulleswater Company* (2) the Plaintiff was the owner of the soil covered with water, and kept up a pier in the lake which prevented the Defendants from bringing their steamboats close to the land immediately adjoining the pier, of which land the Defendants were lessees. That, therefore, was a case in which the riparian proprietor was directly deprived of access to his own property. It was held that the Defendants were entitled to use the Plaintiff's pier, but their right to do so was entirely rested upon the lake being a public navigable lake. There were no pleadings, but Mr. Justice *Blackburn* states what would have been the proper plea for the Defendants to have pleaded. He says (3), "I think that if this case turned on a plea it would be sufficient to allege that the Plaintiff maintained the pier in such a place that it was impossible for the public to use their right to navigate without either knocking down or removing it, and therefore the Defendants having a right to go, went, doing no unnecessary damage, across the pier."

We cite these cases not as decisions that there is no such private right as alleged, but as proving that the wharfinger is amply pro-

(1) 5 C. B. (N.S.) 821. (2) Law Rep. 7 Q. B. 166.
(3) Law Rep. 7 Q. B. 173.

tected in his right of access to his wharf by his interest as one of the public in the right of public navigation, and that there is no necessity to invent any private right in him as a riparian proprietor. There also appears to us to be great difficulty in making any sound distinction between an obstruction in a river which makes the access to a wharf less convenient, and an obstruction in the river which absolutely stops it up. As a general rule, whatever renders the enjoyment of an easement, either natural or acquired, less convenient, or partially obstructs it, is as much a violation of the right as that which totally destroys it. A riparian proprietor above the flow of the tide can bring an action against a person who diverts a half or any substantial quantity of the water as well as if he diverted the whole. So, a person entitled to a carriageway or a footway can bring an action against a person who puts up a gate or a stile where there was no gate or stile before, although such gate or stile may only cause a slight inconvenience in using the way. If a wharfinger had really a private right, distinct from the public right of navigation, to a free access from the river to his wharf, it seems to us that he could bring an action grounded on his private right against any one who rendered that access less convenient; but *Kearns* v. *Cordwainers' Company* (1) and the *Attorney-General* v. *Conservators of the Thames* (2) are direct decisions that he can bring no such action.

On the whole, we are of opinion that the right of a wharfinger to bring an action or file a bill on account of an obstruction in the river which renders the access to his wharf less convenient, and his right to bring an action or suit on account of an obstruction in the river which deprives him of all access to his wharf, depend on the same legal principle, namely, that he suffers a particular damage from a public nuisance, and that in neither case is there a violation of any private right of his, distinct from the public right of navigation which is in all the Queen's subjects.

If this conclusion is correct, it seems to us to follow that we cannot affirm the decision of the Vice-Chancellor consistently with the cases of *Kearns* v. *Cordwainers' Company* and the *Attorney-General* v. *Conservators of the Thames*, and we are certainly not prepared to

(1) 6 C. B. (N.S.) 388. (2) 1 H. & M. 1.

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overrule these decisions. They have, no doubt, been extensively acted upon, and we think they were rightly decided.

If the conservators could not license the erection of any wharf or pier which to a greater or less extent interfered with the access of any wharfinger to his wharf, the conservators could not exercise their powers in the way intended by the Legislature. We think that the rights which are reserved by the 179th section are the private rights of the owners and occupiers of wharfs, and not their interest in the public navigation of the river.

On these grounds we think that the decree of the Vice-Chancellor must be reversed and the bill dismissed with costs, except the costs occasioned by the Defendants the *Fishmongers' Company's* claim of an exclusive right to the use of *Winckworth's Hole*, which costs are to be paid to the Plaintiff, one set of costs to be set off against the other.

Solicitors for the Plaintiff: Messrs. *Brettell, Smythe, & Brettell.*

Solicitors for the *Fishmongers' Company:* Messrs. *Humphreys & Morgan.*

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ACCOMMODATION WORKS—*Injunction—Private Road—Right of User, how limited—Undertaking not to repeat Trespass.*] An estate was intersected by a canal under the powers of its Act, and an accommodation bridge was built by the company, over which a private road, leading across the property to a high road, was carried. Coal pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal-owners subsequently carried the tramway across the bridge (excavating the soil of the roadway on the bridge and approaches), in order to carry their coals to a line of railway on the other side of the property.—An action for trespass having been commenced, and a writ of injunction applied for by the canal company, the coal-owners submitted in the action to judgment for £1 damages and costs, and gave an undertaking not to repeat the trespass complained of.—The coal-owners having, a few months afterwards, again laid down the tramway, but without breaking the soil on the bridge, it was held by *Bacon*, V.C., that, independently of the undertaking in the action, by which the right of the canal company had been recognised and established, the Defendants' right of access to and passage over the accommodation bridge did not justify the making by them of a tramway upon the bridge and the approaches thereto, and injunction granted accordingly:—*Held*, by the Lords Justices, on appeal, that the undertaking given by the Defendants formed a good ground for the interference of the Court (affirming the decision of *Bacon*, V.C.), without going into the question of the right of the Defendants to make the tramway. NEATH CANAL COMPANY *v.* YNISARWED RESOLVEN COLLIERY COMPANY - - - - - - - 450

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ADVANCEMENT—*Purchase in Joint Names—Gift—Resulting Trust—Evidence—Presumption—Ademption.*] A testatrix, both before and after she made her will, purchased sums of stock in the names of herself and the son of her daughter-in-law. By her will she gave the residue of her estate to her daughter-in-law for life, and after her death to the son and the daughter of the daughter-in-law:—*Held*, that, under the circumstances, the sums of stock so purchased were a gift to the son of the daughter-in-law:—*Held*,

ADVANCEMENT—*continued.*
that in such a case the evidence of the son and his wife was admissible, and could not be disregarded as rebutting the presumption of a resulting trust; and that, coupled with the circumstances under which the stock was purchased, it was sufficient to rebut the presumption:—*Held*, on the facts, that the testatrix had not placed herself *in loco parentis* to the son of her daughter-in-law or to the other residuary legatee, and that both these facts would have to be proved to make the gift an ademption of the residuary bequest.—Decision of the Master of the Rolls reversed. FOWKES *v.* PASCOE - - - - 343

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AGREEMENT FOR LEASE—*continued.*
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AGREEMENT TO INDEMNIFY—*Railway Company—Contract with Promoters.*] A solicitor who was promoting a railway company induced various persons to sign the subscription contract, by an assurance that they should incur no liability if the line was not made. Some of these persons were provisional directors. The Act was obtained, and contained the usual clause that the preliminary expenses should be paid by the company. The line was not made. The undertaking was abandoned, and the company ordered to be wound up. The solicitor carried in a claim as creditor for professional services in obtaining the passing of the Act. This claim was opposed by some of the contributories, on the ground of the above assurances:—*Held* (affirming the decision of *Bacon*, V.C.), that the solicitor was entitled to prove, for that the assurances made by him could only operate as a contract to indemnify the individuals to whom they were made, and did not exonerate the company in its corporate capacity.—*Savin* v. *Hoylake Railway Company* (Law Rep. 1 Ex. 9) distinguished. *In re* BRAMPTON AND LONGTOWN RAILWAY COMPANY. SHAW'S CLAIM [177

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APPEAL IN WINDING-UP — *Practice— Inrolment of Order—Cons. Ord. xxiii., r.* 26.] An inquiry as to damages having been directed on a claim under a winding-up, the official liquidator applied to have it conducted in Court and before a jury. This application was dismissed on the 11th of December, 1873. The official liquidator gave notice of appeal to the House of Lords, but not until after the period of three weeks from the dismissal had expired. After the damages had been assessed in Chambers the official liquidator, on the 9th of February, 1875, obtained *ex parte* a conditional order for leave to inrol the order of the 11th of December, 1873, but on hearing the other side this conditional order was discharged:—*Held*, on appeal, that liberty to inrol the order of December, 1873, ought not to be granted. *In re* Charles Laffitte & Co. 316

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Sale by one Contract of Properties held on distinct Trusts.] A messuage belonged to a testator, who devised his real estate in trust for sale. An adjoining messuage was vested in the trustees of his settlement upon trust for sale, and the purchase-money, subject to the payment of definite sums, belonged to the testator's estate. Under a decree for administering the testator's estate the two messuages were put up for sale together in one lot, and it was provided that the purchase-money should be paid into Court to the credit of the cause, "The proceeds of the sale of the testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, and that it was to be paid into Court in a suit unconnected with the settlement:—*Held* (affirming the decision of *Malins*, V.C.), that this objection was not sustainable, for that the Court, having the money in its custody, would see it properly applied. The Court, however, for the satisfaction of the purchaser, ordered that the purchase-money should be apportioned, and the part apportioned to the settled messuage paid into Court to a separate account. Cavendish *v.* Cavendish - - - - - 319

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APPROPRIATION OF PAYMENTS—*Bankers—Agents—Bills.*] Customers of country bankers paid into the bankers a sum of money in bank notes and also some bills of exchange to be remitted to *London* in order to meet certain acceptances. The bankers sent to their *London* agents the bills and some bank notes, with a letter directing them to pay a certain sum of money, also giving them notice of the acceptances as payable at their bank, and giving directions as to other business. The country banker stopped payment, owing a large balance to the *London* bankers:—*Held*, that, as between the country customers and the *London* bankers, there was no appropriation of the bills and notes to meet the acceptances, and that the *London* bankers could retain the bills and notes without meeting the acceptances. —Decree of *Malins*, V.C., affirmed. Johnson *v.* Roberts - - - - - 505

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ARREST OF DEBTOR—*Attachment—Defaulting Trustee—Possession or Control—Debtors Act*, 1869, *s.* 4, *Exception* 3.] In order to bring a trustee within the 3rd exception of sect. 4 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), it is not necessary that the money should have been in his sole possession or under his sole control. Therefore, where a sum of money, forming part of the assets of a testator's estate, was paid into a bank to the joint account of two executors, with power to one of them to draw cheques, and he drew out the money and misapplied it, and an order was made

ARREST OF DEBTOR—*continued.*
against both executors for payment of the money into Court:—*Held* (affirming the decision of the Master of the Rolls), that the other executor was within the exception, and that a writ of attachment might be issued against him for non-payment of the money.—A writ of attachment for non-payment of money is a matter of right, and the Court has no discretion to refuse it. EVANS *v.* BEAR - - - - - - 76

2. —— *Bankruptcy—Attachment—Breach of Trust—Bankruptcy Act*, 1869, *ss.* 12, 49.] A trustee, who had been ordered in a suit to pay into Court an amount admitted to be due from him, and mixed with his own moneys, was adjudicated bankrupt:—*Held*, that although the debt was one from which an order of discharge would not release him, still, as it was a debt proveable under the bankruptcy, he was, pending the bankruptcy proceedings, protected by the *Bankruptcy Act*, 1869, s. 12, from attachment for disobedience to the order. COBHAM *v.* DALTON - - 655

3. —— *Attachment by Common Law Court—Application for Discharge to Court of Bankruptcy—Debtors Act*, 1869, *s.* 5—*Bankruptcy Act*, 1869, *ss.* 12, 13.] A solicitor who had made default in payment of a sum of money due from him as solicitor was adjudicated bankrupt, and after his adjudication was arrested under a writ of attachment issuing out of the Court of Exchequer. He applied to the Court of Bankruptcy to order his discharge.—The Lords Justices, in the exercise of their discretion under the 13th section of the *Bankruptcy Act*, 1869, declined to interfere with the writ of attachment issued by the Court of Exchequer, and refused the application. *In re* DEERE - - - - - - 658

4. —— *Attachment — Wilful Default — Ex parte Application—Irish Decree*—41 *Geo.* 3, *c.* 90, *s.* 6; 32 & 33 *Vict. c.* 62, *s.* 4.] The *Act for the Abolition of Imprisonment for Debt* (32 & 33 Vict. c. 62, s. 4) extends to an application under 41 Geo. 3, c. 90, to commit for disobedience to a decree of the Irish Court of Chancery.—But a trustee who has been ordered to pay money which he had neglected to recover is not within the third exception of that section, and cannot be committed for default in paying the money.—*Semble*, an order for an attachment against a Defendant who is said to be within that exception ought not to be made *ex parte*.—Order of *Hall*, V.C., discharged. FERGUSON *v.* FERGUSON - - 661

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ATTACHMENT OF DEBT—*Garnishee Order—Order nisi against Executors—Payment by Executors into Court in Administration Suit—Bankruptcy of Judgment Debtor—Charge of Judgment Creditor on the Fund—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61, 62—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16.] A judgment creditor obtained a garnishee order *nisi* under the *Common Law Procedure Act*, 1854, against the executors of *P.*, a debtor of the judgment debtor. At that time *P.*'s estate was being administered in the Court of Chancery, and after the service of the garnishee order the executors paid the personal estate in their hands into Court, and a sufficient sum to answer *P.*'s debt to the judgment debtor was carried to the separate account of the judgment debtor in the suit. The judgment debtor afterwards filed a petition for liquidation, and obtained an injunction restraining the judgment creditor from proceeding with his garnishee order. The trustee in the liquidation then applied in the suit for payment to him of the sum standing to the separate account of the judgment debtor:—*Held* (reversing the decision of *Malins*, V.C.), that there was no debt owing to the judgment debtor in the hands of the executors of *P.* at the time when they were served with the garnishee order, within the meaning of the 61st and 62nd sections of the *Common Law Procedure Act*, 1854, and consequently the judgment creditor had no charge on the fund in Court.—Whether the application of the trustee ought not to have been made to the Court of Bankruptcy, *quære*.—*Per Mellish*, L.J.:—If a garnishee order is made against the executors of a debtor of the judgment debtor, it ought to appear on the face of it that they are sought to be charged as executors. STEVENS *v.* PHELIPS [417

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BANKRUPTCY JURISDICTION — *Execution Creditor—Action against the Sheriff for Damages—Application in Bankruptcy — Res Judicata.*] A judgment creditor levied execution against his debtor, and the sheriff took possession of the debtor's goods; but before the sale took place the debtor filed a petition for liquidation, and a receiver was appointed, who obtained an injunction restraining the sale on giving the usual undertaking to abide by any order as to damages. The liquidation proceedings became abortive, and a petition for adjudication was presented, under which the debtor was adjudicated bankrupt, and the sheriff gave up the goods to the trustee.—The execution creditor then brought an action against the sheriff for damages sustained by his parting with the goods. The action was determined in the sheriff's favour, on the ground that the debtor was a trader, and had committed an act of bankruptcy by suffering the execution. Afterwards, the execution creditor made an application in bankruptcy for damages under the undertaking given by the receiver, in which he relied on the same point as in the action, namely, that the debtor was not a trader:—*Held*, that the matter was *res judicata*, and as the creditor had elected to take his remedy at law against the sheriff, the Court of Bankruptcy could not entertain the question. *Ex parte* Harper. *In re* Bremner [379

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BEQUEST OF SHARES—*Will—Railway—Railway Stock.*] A bequest of railway shares will carry railway stock.—A testator who had stock in the public funds, and also stock in a railway company, and partly paid-up shares in the same company, made a bequest of "all such stocks in the public funds or shares in any railway" of which he might die possessed:—*Held* (reversing the decision of the Master of the Rolls), that the railway stock passed under the bequest.—*Oakes* v. *Oakes* (9 Hare, 666) overruled. Morrice *v.* Aylmer - - - - - 148

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BUILDING SOCIETY—*Mortgage—Power of Sale—Right of Society to Payments in respect of Interest after Repayment of Principal.*] A member of a permanent benefit building society obtained an advance in respect of his shares on his executing a mortgage in the form prescribed by the rules, by which he was to pay the principal and interest at £5 per cent. by monthly subscriptions extending over seven years. The deed contained a power of sale by the trustees of the society in case of default in payment of the subscriptions, and it was declared that the trustees should retain out of the purchase-money, after payment of expenses, "all such subscriptions, fines, and other sums of money and payments which should be then due, or which should afterwards become due, in respect of the said shares during the remainder of the period of seven years, it being agreed that in case of any such sale, all the moneys which would at any time afterwards become due from the mortgagor in respect of the said shares, according to the rules of the association, should be considered as then immediately due and payable: and should pay the residue of the purchase-money to the mortgagor." The mortgagor paid a few of the subscriptions and then fell into arrear, and the mortgaged property was sold by the trustees:—*Held*, that the trustees of the society were entitled to retain out of the proceeds of the sale all subscriptions and fines payable up to the time of the completion of the sale, and such further sum as represented the balance of the principal sum remaining at that time unpaid, but that they were not entitled to any payment in respect of interest accruing after the principal had been all repaid. *Ex parte* Osborne. *In re* Goldsmith - - - - - - 41

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—— *Cebb, Ex parte* (Law Rep. 8 Ch. 727) explained 382
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—— *Coope* v. *Cresswell* (Law Rep. 2 Ch. 112) followed - - - - 567
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—— *Dixon* v. *Holden* (Law Rep. 7 Eq. 488) overruled - - - - 142
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—— *Hensman* v. *Fryer* (Law Rep. 3 Ch. 420) followed - - - - 136
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—— *Megrath* v. *Gray* (Law Rep. 9 C. P. 216) followed - - - - 211
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—— *Morris* v. *Livie* (1 Y. & C. Ch. 380) distinguished - - - - 567
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—— *Oakes* v. *Oakes* (9 Hare, 666) overruled 148
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—— *Orgill's Case* (21 L. T. (N.S.) 221) disapproved of - - - - 593
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—— *Springhead Mining Company* v. *Riley* (Law Rep. 6 Eq. 551) overruled - - 142
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—— *Waring, Ex parte* (19 Ves. 345) considered [198, 405, 628, 635, 639
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—— *Wilson* v. *Lloyd* (Law Rep. 16 Eq. 60) disapproved - - - - 211
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—— *Woodcock* v. *Duke of Dorset* (3 Bro. C. C. 569) explained - - - 555
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—— *Wright* v. *Wilkin* (4 Jur. (N.S.) 804) observed upon - - - - 127
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See Gift to a Class.

CLOSE OF LIQUIDATION—*Liquidation by Arrangement—After-acquired Property—Bankruptcy Act,* 1869, *ss.* 12, 15, 47, 48, 49, 125, *sub-ss.* 7, 9.] When the creditors of a liquidating debtor have passed a resolution granting him his discharge, his after-acquired property does not vest in the trustee, but belongs to the debtor, although no resolution closing the liquidation has been passed. *In re Bennett's Trusts* (Law Rep. 19 Eq. 245) overruled. Ebbs *v.* Boulnois - - 479

2. —— *Bankruptcy—Liquidation by Arrangement—Discharge of Debtor—Bankruptcy Act,* 1869, *ss.* 12, 15, 47, 48, 125, *sub-ss.* 7, 9.] When the creditors of a liquidating debtor have passed a resolution granting him his discharge, his after-acquired property does not vest in the trustee for the benefit of the creditors, but belongs to the debtor; although no resolution fixing the close of the liquidation has been passed.—Decision of *Bacon,* V.C., reversed. *In re* Bennett's Trusts [490

COMBINATION—Improvement—Patent 667, [675, n.
See Infringement of Patent. 1, 2.

COMMITTAL—Debtor—Debtors Act, 1869 76, [655, 658, 661
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—— Address of contributory - - 227
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—— Insurance—Costs of winding up—Marshalling - - - - - - 1
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COMPENSATION—Irish Church Act—Advowson [610
See COMPENSATION UNDER IRISH CHURCH ACT.

—— Lands Clauses Act - - 435, 445, 459
See COMPENSATION UNDER LANDS CLAUSES ACT. 1, 2, 3.

—— Vendor and purchaser—Miscalculation of value - - - - 424
See SPECIFIC PERFORMANCE WITH COMPENSATION.

COMPENSATION UNDER IRISH CHURCH ACT (32 & 33 *Vict. c.* 42), *s.* 18—*Compensation Money—Executor—Devisee—Ademption—Conversion.*] A testator made a devise of advowsons in *Ireland*. The *Irish Church Act* was then passed abolishing advowsons and giving their owners a right to compensation. The testator after the passing of the Act made a codicil to his will and then died. Compensation for the advowsons was claimed on behalf of the devisee, and was ascertained and made payable to the executors of the testator:—*Held*, that the compensation money was payable to the executors of the testator, and not to the devisee of the advowsons.—Decision of *Hall*, V.C., affirmed. FREWEN *v.* FREWEN - - 610

COMPENSATION UNDER LANDS CLAUSES ACT —8 *Vict. c.* 18, *s.* 68—*Lands injuriously affected—Other Lands—Prospective Value—Umpire—Evidence.*] A railway company took land on which cotton-mills would probably have been built; the owner had other land on which he had built a reservoir from which water might be supplied to such cotton-mills when built. In proceeding under the *Lands Clauses Act* to ascertain the compensation, the umpire received evidence as to the profits which might have been derived from supplying water to the mills when built, and awarded compensation for the loss of those prospective profits:—*Held* (affirming the decree of the Master of the Rolls), that the umpire was right in receiving the evidence and in awarding such compensation. RIPLEY *v.* GREAT NORTHERN RAILWAY COMPANY - - - 435

2. —— *Practice—Funds dealt with in different Branches of the Court.*] Where two funds paid into Court under the *Lands Clauses Act* have been dealt with by different branches of the Court, and it is desired to deal with both funds at the same time, the Court will give leave to present one Petition in both matters in one branch of the Court, without transferring either of the matters. *In re* LORD ARDEN'S ESTATES - 445

3. —— *Lands injuriously affected*—10 & 11 *Vict. c.* 17, *s.* 6—8 *Vict. c.* 18, *s.* 68—*Answer—*

COMPENSATION UNDER LANDS CLAUSES ACT —*continued.*

Demurrer—Costs.] The abstraction by a waterworks company of water from a stream does not entitle a riparian proprietor below to require the company to treat, under the 6th section of the *Waterworks Clauses Act*, 1847, for the purchase of his interest in the stream, but entitles him only to compensation as for land injuriously affected.—Where a bill is dismissed at the hearing, the Defendant will not, on the ground that he might have raised the same defence by demurrer, be deprived of his costs.—Decree of the Master of the Rolls affirmed. BUSH *v.* TROWERIDGE WATERWORKS COMPANY - - - - - - 459

COMPOSITION WITH CREDITORS—Resolution for—Validity—Refusal of debtor to answer inquiries - - - 88
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—— Resolution—Effect of, on writ delivered to sheriff - - - - 663
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See STAYING PROCEEDINGS IN BANKRUPTCY. 1.

COMPROMISE—Criminal proceedings—Illegality
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COMPROMISE, HOW ENFORCED—*Practice—Agreement for Compromise.*] In a redemption suit against the mortgagee in possession of business premises, a compromise was agreed upon, under which the mortgagor was to pay a fixed sum on a certain day, and the mortgagee was to carry on the business in the meantime, and give up possession on payment, and all proceedings in the suit were to be stayed. The mortgagee failed to pay the money at the time appointed:—*Held* (reversing the decision of *Malins*, V.C.), that the agreement for compromise could not be enforced on motion in the suit, but a fresh bill must be filed for specific performance.—*Semble*, if an agreement for compromise relates simply to the prosecution of the suit, the Court will enforce its performance on motion in the suit. PRYER *v.* GRIBBLE - - - - 534

CONCEALMENT OF MATERIAL FACT—Purchase by person in insolvent circumstances 446
See RESCISSION OF CONTRACT. 1.

CONCURRENT PETITIONS—*Winding-up—Transfer.*] When a petition to wind up a company has been presented, another petition for the same purpose subsequently presented and attached to a different branch of the Court will be ordered to be transferred to that branch of the Court to which the first petition is attached. *In re* WEST HARTLEPOOL IRONWORKS COMPANY - - 629

CONDITION—Bill of sale - - - 367
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CONFIRMATION—Security—Undue influence—Lady just of age - - - 15
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CONTRACT—Infant - - - - 373
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—— Paid-up shares—Companies Act, 1867, s. 25 [157, 614
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—— Rescission - - - 446, 515
See Rescission of Contract. 1, 2.
—— Usurious—Mortgage of reversion - 389
See Usurious Contract.

CONTRACT BY INFANT—*Adjudication of Bankruptcy — Petitioning Creditor's Debt — Judgment against Debtor on Contract made in Infancy— — Investigating Consideration for Judgment — Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62)—*Ratification.*] The 2nd section of the *Infants' Relief Act*, 1874, which enacts that no action shall be brought on any ratification made after full age of a contract made during infancy, applies to ratifications made, after the passing of the Act, of contracts made before that time.—An infant, before the passing of the Act, gave a bill of exchange, payable after his majority, to a jeweller in payment for jewelry. After his majority, and after the Act came into operation, the creditor obtained judgment by default against him in an action on the bill of exchange, and then took out a debtor's summons, and, on his failing to comply with it, filed a petition for adjudication against him:—*Held*, that the Court of Bankruptcy would look into the consideration for the judgment; and that if the conduct of the debtor, in allowing the judgment to go by default against him, operated as a ratification of the bill of exchange, such ratification was rendered void by the 2nd section of the Act; and the petition for adjudication was consequently dismissed. *Ex parte* Kibble. *In re* Onslow [373

CONTRACT FOR PAID-UP SHARES—*Registration of Contract—Cancellation of Shares—Agreement with Promoters—Mistake—Companies Act*, 1867, *s.* 25.] Certain shares were allotted and accepted as fully paid up in pursuance of a contract with a trustee for the company, which, through inadvertence, had not been registered in accordance with sect. 25 of the *Companies Act*, 1867. Upon discovery of the omission the directors cancelled the shares and removed the name of the allottee from the register, then registered the contract, and subsequently issued fresh shares to the allottee. The company was afterwards wound up:—*Held*, that the directors had power to rectify a mistake which was common to them and the allottee, and that the transaction could not be disturbed:—*Held*, also, that a contract with a trustee for a company, adopted by the company, is within the meaning of the 25th section of the *Companies Act*, 1867.—Order of the Master of the Rolls affirmed. *In re* Poole Firebrick and Blue Clay Company. Hartley's Case - - 157

2. —— *Company—Companies Act*, 1867, *s.* 25.] The memorandum of association of a limited joint stock company established for working guano stated that the capital of the company should consist of 2500 shares of £10 each. The articles contained a clause providing that all the original shares should be considered fully paid-up shares; and a clause empowering the directors to purchase property for the company with paid-up shares. All the original shares, except one share retained by each of the subscribers of the memorandum, were allotted, as fully paid-up shares, to the vendor of a concession for working guano, in pursuance of a contract made by him with one of the promoters of the company; but this contract was not registered. The company was afterwards ordered to be wound up:—*Held* (affirming the decision of *Malins*, V.C.), that the articles of association did not constitute a contract within the 25th section of the *Companies Act*, 1867, and that the holder of vendor's shares, who took them with notice of the circumstances under which they were allotted, was liable to calls to the full nominal amount of the shares. *In re* Caribbean Company. Crickmer's Case - - - 614

CONTRIBUTORY—Director—Shares paid up out of company's money - - 593
See Fiduciary Relation. 2.
—— Paid-up shares—Contract for—Companies Act, 1867, s. 25 - - 157, 614
See Contract for paid-up Shares. 1, 2.
—— Proof against unregistered company - 48
See Proof against Co-partner. 1.
—— Registered address - - - 227
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CONVERSION—*Lunatic's Estate—Sale of Real Estate—Lease of Minerals for a gross Sum—Tenant in Common—Subsequent Confirmation by the Court —Lunacy Regulation Act*, 1853 (17 & 18 *Vict. c.* 70), *ss.* 124, 130, 131.] *A.*, *B.*, and *C.* were tenants in common in fee of land. *C.* became of unsound mind. *A.* and *B.* sold part of the land, and conveyed their shares to a purchaser. They also granted a lease of the minerals under other parts, and demised their shares to the lessee, in consideration of a gross sum of money payable by instalments, called in the lease rent, within a limited time. In both deeds they covenanted that *C.* should concur, and that they would hold her share of the moneys payable in trust for her.—*B.* afterwards became also of unsound mind, and *A.* sold other parts of the land, and granted leases of minerals under other parts for a like consideration, covenanting in like manner that *B.* and *C.* should concur, and that he would hold their shares of the moneys payable in trust for them. *B.* and *C.* were both found lunatic by inquisition; and the Court confirmed the sales and leases, and ordered the committee to execute the deeds.—*C.* died, leaving *B.* her heir-at-law and sole next of kin. Afterwards *B.* died also:—*Held*, that the leases were in the nature of absolute sales of portions of the

CONVERSION—*continued.*

real estate; that the confirmation of the sales and leases were sales under the 124th section of the *Lunacy Regulation Act*, 1853; and that as between the real and personal representatives of *B.* the proceeds both of the sales and the leases effected after *B.* became of unsound mind belonged to her heir-at-law as real estate.—But *held*, that as to the shares both of *B.* and *C.* in the proceeds of the sale and lease in which *B.* concurred, they were converted into personalty, and belonged to *B.'s* next of kin. *In re* Mary Smith (a Lunatic) 79

—— Compensation for advowson - - 610
See Compensation under Irish Church Act.

COPIES OF AFFIDAVITS—*Notice to read Evidence—Entering Evidence in Order—Objection to Evidence.*] The Appellants from an order on a claim in a winding-up gave notice to read a mass of affidavits made in the winding-up but not used on the hearing below. The Respondent objected to their being admitted, but took copies. The Court of Appeal confined the argument in the first instance to a question not affected by these affidavits, and being against the Appellants on that question, dismissed the appeal with costs, so that the question as to the admissibility of the affidavits was not decided. The Respondent applied to have the affidavits entered in the order, as otherwise he would not be able to get the costs of having taken copies:—*Held*, that the application could not be granted, and that the Respondent ought not to have taken copies unless and until the Court held the evidence admissible, in which case it would have given him time to enable him to meet it. *In re* Brampton and Longtown Railway Company. Shaw's Claim (No 2) 186

COSTS—Charges of fraud - - - 96
See Fiduciary Relation. 1.

—— Copies of affidavits - - - 186
See Copies of Affidavits.

—— Devisee claiming unsuccessfully as creditor
See Marshalling. 2. [136

—— Failure to raise defence by demurrer - 459
See Compensation under Lands Clauses Act. 3.

—— Inquiry as to damages—Subsequent costs
See Costs of Inquiry. [334

—— Lands Clauses Act - - 56, 328
See Costs under Lands Clauses Act. 1, 2.

—— Lien for—Solicitor - - - 291
See Solicitor's Lien.

—— Lunacy—Inquiry as to alleged lunacy 75
See Costs in Lunacy.

—— Misjoinder - - - - 580
See Misjoinder.

—— Security for—Company being wound up
See Security for Costs. [628

—— Specific performance—Partial failure of defendant's case - - - 424
See Specific Performance with Compensation.

—— Trade-mark—Deception - - 276
See Trade-mark.

COSTS—*continued.*

—— Winding up—Insurance company—Marshalling - - - - - 1
See Marshalling. 1.

—— Witness—Cross-examination - - 288
See Costs of Witness.

COSTS IN LUNACY—*Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *s.* 11—*Inquiry based upon Report of Commissioners—Order for Costs out of alleged Lunatic's Estate.*] Where an inquiry as to the lunacy of a supposed lunatic had been based upon the Report of the Commissioners in Lunacy, and had resulted in his being declared of sound mind, the Court ordered the costs of the proceedings in lunacy and of the inquiry to be paid out of the supposed lunatic's estate. *In re* C—— (an alleged Lunatic) - - - - 75

COSTS OF INQUIRY—*Costs—Appeal for—Inquiry—Costs given generally by Decree, not reserving further Consideration—Subsequent Costs.*] By a decretal order specific performance was decreed against a vendor; an inquiry was directed what damage had been sustained by the Plaintiffs by reason of the acts complained of in the bill, and the Defendant was ordered to pay the costs of suit; liberty to apply being given, but further consideration not being reserved. The acts complained of by the bill were—commencing to pull down buildings and removing the materials, and cutting and carrying away the crops on the land. The Plaintiff carried in a very large claim for damages under various heads, most of which were at once rejected in Chambers, but a certificate was made (which Vice-Chancellor *Bacon* refused to vary) giving damages for pulling down buildings, and also under four other heads. The Lords Justices, on appeal, held that no damage was shewn, on the ground that, under the peculiar circumstances, pulling down the buildings caused no damage, and that the other heads of damage were not within the scope of the inquiry. The Defendant subsequently applied for the costs of the inquiry, on the ground that it had resulted wholly in his favour. This application having been refused by Vice-Chancellor *Bacon*:—*Held*, on appeal, that the Plaintiff, though unsuccessful, was entitled to the costs of the inquiry so far as they related to pulling down buildings, removing materials, and cutting and carrying away crops; but must pay all the other costs of the inquiry. Krehl *v.* Park - - - - 334

COSTS OF WITNESS — *Cross-examination—Gen. Ord. 5th Feb.*, 1861, *r.* 19.] The Plaintiff produced a witness before the examiner, and demanded the expenses of his production. The Defendant's solicitor objected to the amount, but undertook to pay what should be found due upon taxation. The witness was then sworn, and the cross-examination proceeded. The Plaintiff then applied for an order for repayment by the Defendant of the amount paid by the Plaintiff to the witness for his expenses, or for taxation, and payment of the amount found due. Vice-Chancellor *Hall* considered that the question had better be left till the hearing of the cause, and declined to make any order:—*Held*, on appeal, that the matter was not one for judicial discretion, but that the Plaintiff was entitled, *ex debito justitiæ*, to an

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immediate order for taxation and payment. RICHARDS *v.* GODDARD - - - 288

COSTS UNDER LANDS CLAUSES ACT, 1845, *s.* 73—*Costs of Tenant for Life.*] A tenant for life opposed the passing of a canal bill, but only obtained the insertion of some clauses for the protection of the estate. The *Lands Clauses Act* was incorporated with the Act when passed. After its passing the company took part of the settled estate and paid the money into Court. In the proceedings for ascertaining the value of the land taken, the tenant for life had incurred costs beyond what the company were liable to pay, and he presented a petition for payment of these costs and of the costs of opposing the bill out of the fund. The Master of the Rolls having declined to make any order:—*Held*, that the Petitioner was entitled to be paid out of the fund all costs properly incurred by him in relation to the purchase since the passing of the Act, but not any costs of opposing the bill in Parliament. *In re* EARL OF BERKELEY'S WILL. *In re* GLOUCESTER AND BERKELEY CANAL ACT, 1870 - - 56

2. —— *Lands Clauses Act—Reinvestment in Land—Funds dealt with in different Branches of the Court—Service of Petition on Incumbrancers.*] Two portions of a settled estate had been taken under the *Lands Clauses Act* by different corporations, and the purchase-money had been paid into Court and dealt with by different branches of the Court. It being desired to invest the two funds together in the purchase of land, two petitions were presented. The Court allowed the costs of one only as costs under the Act.—Where a petition is presented simply for the investment in land of money paid into Court under the *Lands Clauses Act*, and there are mortgages or annuities charged upon the estate, the proper course is to serve the mortgagees or annuitants with a copy of the petition and 40*s.* costs, with an intimation that if they appear they will be liable to pay their own costs. *In re* GORE LANGTON'S ESTATES - - - - - 328

CREDITOR—Debtor's summons—Several joining in one summons - - - 373
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—— Examination of—Debtor's summons - 269
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CREDITOR'S DEED—Appointment of new trustee
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See SUPPORT TO BUILDINGS.

—— Undertaking as to—Receiver in bankruptcy
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DAMAGES IN DETINUE—*Creditor—Detinue—Trover.*] Where a verdict at law has been obtained for £100 in default of delivery of a chattel to the Plaintiff, he cannot, before issuing execution, be considered as a creditor of the Defendant for the £100. *In re* SCARTH - - - 234

DEATH COUPLED WITH A CONTINGENCY—*Marriage Settlement — Construction — Vesting — Leaving Issue—Death in Lifetime of Parents.*] By a marriage settlement, reciting an intention to provide for the husband and wife and their issue, a fund was settled in trust for the husband for life, then for the wife for life, and after the death of the survivor, if they should leave any issue who being daughters should marry or attain twenty-one, or being sons attain twenty-one, to transfer the fund unto and equally among all such issue when they should attain twenty-one, or be married, if a daughter or daughters, with consent; and in the meantime, and until the said issue should attain twenty-one or be married as aforesaid, to pay the income for their maintenance: Provided always, that if any such issue as aforesaid should happen to die before they should respectively become entitled to and actually receive their portions, leaving issue of their respective bodies them surviving, then such last-mentioned issue should take and be entitled to his, her, or their father's or mother's share or shares equally among them, to be paid and transferred at the same time or times as was declared concerning the whole original trust-moneys and the immediate issue of the marriage. There was a gift over if the husband and wife should die without leaving any issue of their two bodies begotten, or being such, they should all die before they should respectively become entitled to receive their portions and without leaving issue. Two of the four children of the marriage died infants and unmarried in the lifetime of their parents. Another attained twenty-one and died a bachelor in the lifetime of the father, and the fourth attained twenty-one and survived both parents:—*Held* (reversing the decision of *Hall*, V.C.), that the representative of the child who attained twenty-one and died in the lifetime of the father took nothing; but that the whole fund went to the survivor.—*Woodcock* v. *Duke of Dorset* (3 Bro. C. C. 569) explained. JEYES *v.* SAVAGE - - 555

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See DEATH COUPLED WITH A CONTINGENCY.

DEBT—Fraudulent—Liability of bankrupt 652
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DEBTOR—Arrest of—Attachment 76, 655, 658.
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—— Compounding—Refusal to answer inquiries
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—— Discharge in bankruptcy - 255, 479
See DISCHARGE IN BANKRUPTCY. 1, 2.

DEBTOR'S SUMMONS — *Bankruptcy — Trader—Owner of Phosphate Mine—Bankruptcy Act*, 1869, *s.* 6. *sub-s.* 6.] In order to constitute a debtor a trader within the *Bankruptcy Act*, 1869, s. 6, sub-s. 6, he must be a trader at the time when the debtor's summons is served.—The owner of a phosphate mine who sells the phosphate is not a trader within the meaning of the bankruptcy law. *Ex parte* SCHOMBERG. *In re* SCHOMBERG - 172

2. —— *Bankruptcy—Practice—Security—Balance of Probabilities of Result of Action—Bankruptcy Act*, 1869, *s.* 7.] Where a debtor's summons is ordered to stand over for an action to be brought, and the Court is of opinion that the probability is as much in favour of the success of the alleged debtor as of the creditor, the Court will not order security to be given. *Ex parte* TURNER. *In re* TURNER - - - - - 175

3. —— *Bankruptcy — Bankruptcy Act*, 1869, *ss.* 6, 7, 8, 9.] *H.*, in October, 1874, was served with a debtor's summons for a sum alleged by *C.* to be due to him on the balance of an account. On the 1st of December an application by *H.* to dismiss the summons was refused with costs, on the ground of a defect in the jurat of his affidavit. *C.* on the following day presented a petition for adjudication. *H.* gave notice to dispute the debt and the act of bankruptcy. On hearing the petition on the 17th of December, the Registrar ordered *H.* within seven days to enter into a bond with two sureties for £400 to pay what *C.* might recover in an action, and stayed proceedings in bankruptcy till the action had been tried. Seven days having elapsed without the bond being given, *C.* served notice of motion to proceed in bankruptcy, and on the hearing of the motion the Registrar, without entering into the merits, adjudged *H.* bankrupt:—*Held*, on appeal, that the order for adjudication was wrong, for that the debt not having been established at law, it was the duty of the Registrar to investigate the account and decide whether a debt sufficient to support an adjudication was due. *Ex parte* HARRIS. *In re* HARRIS - - - - - - 264

4. —— *Bankruptcy—Proof of Debt—Right of Debtor to summon Creditor for Examination — Bankruptcy Act*, 1869, *s.* 7.] Where a debtor's summons has been issued and the debtor denies the debt, he has no absolute right to require the attendance of the summoning creditor for the purpose of examination. *Ex parte* BARRON. *In re* IRVING - - - - - 269

5. —— *Several Creditors joining in one Summons.*] If several creditors unite in a debtor's summons, they must stand or fall together; and if a petition for adjudication of bankruptcy is founded on the summons, they must all join in it. *Ex parte* KIBBLE. *In re* ONSLOW - - 373

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DEPOSIT BY RAILWAY COMPANY—Payment out of Court—Vacation business - 541
See VACATION BUSINESS.

DEPOSIT OF DEEDS — Bill for redemption—Dismissal - - - - 250
See FORECLOSURE.

DEPOSIT ON SALE—*Vendor and Purchaser—Deposit, Forfeiture of—Disclaimer of Purchase by Trustee in Bankruptcy—Bankruptcy Act*, 1869, *ss.* 23, 24—*Vendor entitled to Deposit.*] Where a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit.—By a contract for sale of real estate it was stipulated that a portion of the purchase-money should be paid immediately, and the residue on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt, and the trustee disclaimed the contract under the 23rd section of the *Bankruptcy Act*, 1869, and called upon the vendor to repay the deposit:—*Held*, that the vendor was entitled to retain the deposit. *Ex parte* BARRELL. *In re* PARNELL - - 512

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See DAMAGES IN DETINUE.

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DEVISEE—Alienation by—Rights of creditor 567
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—— Conversion — Compensation under Irish Church Act - - - - 610
See COMPENSATION UNDER IRISH CHURCH ACT.

DISCHARGE IN BANKRUPTCY—*Liquidation—After-acquired Property—Resolutions passed for Benefit of Debtor—Bankruptcy Act*, 1869, *s.* 125.] A debtor having commenced proceedings for liquidation, his creditors passed a resolution that his discharge should be granted to him on his paying £4000 in a month, and giving a bond for payment of £5000 more to the trustee by five yearly instalments. In default of payment of any instalment, the whole £5000 was to become payable at once. The £4000 was paid, the bond given, and two yearly instalments paid under it, but default was made in payment of the third. The debtor then commenced fresh proceedings for liquidation, and presented a statement of accounts shewing a large amount of debts and hardly any assets. He was in receipt of half-pay as a retired officer in the army. The creditors passed a resolution that the affairs of the debtor should be liquidated by arrangement; that until full payment of the debts the debtor should pay to the trustee the excess of his income above £600 a year; and that as soon as a deed had been executed to carry the above resolutions into effect the debtor should, without any further resolution, be discharged from the debts. The trustee under the former liquidation proved for the £3000, and voted for

DISCHARGE IN BANKRUPTCY—*continued.*
the resolutions without the consent of the committee of inspection, and without his vote the resolutions would not have been passed. The Registrar having refused to register these resolutions:—*Held*, that after the £4000 mentioned in the former resolutions had been paid and the bond given, the future property of the debtor was released, and that the former liquidation was not pending so as to prevent the debtor from instituting fresh proceedings for liquidation:—*Held*, also, that the trustee under the former liquidation had all the rights of a creditor for £3000, and that his vote in the second liquidation was effectual whether his voting as he did was a breach of trust or not: But, *held*, that the resolutions under the second proceedings were manifestly not passed for the benefit of the creditors, but for the sake of discharging the debtor, and therefore were not binding on dissentient creditors, and that on this ground they ought not to be registered. *Ex parte* Sir William Russell. *In re* Sir William Russell - - - - - - 255

2. —— *Joint and Separate Estates—Separate Creditors passing no Resolution—Bankruptcy Act*, 1869, *s.* 125—*Bankruptcy Rules*, 1870, *s.* 285.] Where proceedings for liquidation have been instituted by partners, and the joint creditors have passed a resolution for liquidation and appointed a trustee, the separate estate of each partner, as well as the joint estate, vests in the trustee so appointed; and if no resolution is passed by the separate creditors, the trustee must administer the separate estate according to the laws of bankruptcy. In such a case a discharge by the joint creditors will not operate to discharge any partner or his separate estate from his separate debts. Ebbs *v.* Boulnois - - - - - - 479

—— Close of liquidation - - - 490
See Close of Liquidation. 2.

DISCHARGE OF SURETY—*Principal and Surety—Bill of Exchange—Resolution to accept Composition from Acceptor—Discharge of Drawer—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126.] Where the acceptor of a bill of exchange presents a petition for liquidation or composition under the *Bankruptcy Act*, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is not thereby discharged from his liability. In such a case it makes no difference whether the bill-holder is present at the meeting or not, or whether he votes in favour of the resolution or against it. *Megrath* v. *Gray* (Law Rep. 9 C.P. 216) followed. *Wilson* v. *Lloyd* (Law Rep. 16 Eq. 60) disapproved. *Ex parte* Jacobs. *In re* Jacobs 211

DISCLAIMER—Trustee in bankruptcy—Contract for sale - - - - 512
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—— Staying proceedings in bankruptcy - 215
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—— Taking evidence *vivâ voce* - - 127
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—— Order directing an issue—Appeal - 467
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—— Winding-up petition - - - 470
See Winding-up Petition.

DISMISSAL FOR WANT OF PROSECUTION—*Practice—Appeal—Discretion.*] Where, on a motion to dismiss for want of prosecution, the Judge of the Court below has, by way of indulgence, given further time to the Plaintiff, the Court of Appeal will not interfere with the order so made in the discretion of the Judge of the Court below. Sheffield *v.* Sheffield - 206

DISMISSAL OF BILL—Redemption suit - 256
See Foreclosure.

DOCUMENT OF TITLE—Wharfinger's certificate - - - - - - 491
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—— Production of - - - 194, 340
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DOUBLE INSOLVENCY—Security for bills of exchange - - 198, 405, 631, 639
See Securities for Bills of Exchange. 1, 4.

DRAWER OF BILL OF EXCHANGE—Release of - - - - - 211
See Discharge of Surety.

DURESS—Compromise—Apology - - 297
See Libel.

EASEMENT—Alteration of - - 582, 586
See Alteration of Easement. 1, 2.

ELECTION—*Proof of—Conduct.*] In order to establish a case of election by conduct, it must be shewn that the person bound to elect has full knowledge of his rights, and acted with an intention to elect.—Decision of *Malins*, V.C., affirmed. Wilson *v.* Thornbury - - - 239

ELECTION OF REMEDY—Execution creditor—Action against sheriff—Bankruptcy
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EVIDENCE—Compensation under Lands Clauses Act—Prospective value - - 435
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—— Costs of witness - - - 288
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—— Objection to taking copies of affidavits 186
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—— Proof of documents at the hearing - 239
See EVIDENCE AT THE HEARING. 2.

—— Vivâ voce, at the hearing - - 127
See EVIDENCE AT THE HEARING. 1.

EVIDENCE AT THE HEARING—*Witness—Evidence—Discretion—Gen. Ord. 5th Feb.* 1861, *Rule* 3—*Hostile Witness.*] Where the Judge below has refused leave to have the evidence at the trial taken *vivâ voce*, the Court of Appeal will not give such leave.—There is no rule that a witness on his examination in chief before the examiner may not be treated as a hostile witness.—*Wright* v. *Wilkin* (4 Jur. (N.S.) 804) observed upon. OHLSEN *v.* TERRERO - - - 127

2. —— *Practice—Evidence—Proof of Handwriting at the Hearing—Discretion of the Court—Documents scheduled to Affidavit—Proof of—Election.*] The Court has a discretion whether it will allow documents to be proved at the hearing under an order of course obtained at the Rolls Court—Where a party, during the hearing of a cause, obtained an order of course to prove a letter in support of one of the main issues in the cause, no notice having been given to the other side of his intention to use the letter in evidence, the Court refused to allow the letter to be proved.—A document described in Plaintiff's affidavit of documents as "Copy of a letter from Plaintiff to Defendant," and produced at the hearing, cannot be read by the Defendant, the original not having been proved.—*Semble*, that no documents so scheduled by one party can be read by the other party without regular proof. WILSON *v.* THORNBURY 239

EXCEPTIONS FROM DEBTORS ACT—Defaulting trustee - - 76, 655, 658, 661
See ARREST OF DEBTOR. 1—4.

EXCESSIVE APPOINTMENT—*Power—Remoteness—Power to appoint by Will—Absolute Interest.*] Where, under a special power, an appointment is made giving an invalid power of appointment with a gift over in certain events, the gift over is not invalidated by the invalidity of the power.—A power to appoint is not bad because it may be so exercised as to render the appointment void as being too remote.—A power to appoint to children absolutely may be exercised by giving a child an estate for life with power to appoint by will.—A testator gave certain property upon trust for his granddaughter *A.* for life, and after her death for her children, or some of them, as she should by deed or will appoint. *A.*, by her will, appointed one-fifth of the fund to each of five children (all of whom were living at the death of the original testator) for life, and directed that, after the death of each child, the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment in favour of the survivors in different events:—*Held*, a good exercise of the power of appointment.—*Phipson* v. *Turner* (9 Sim. 227) followed.—Decision of Lord *Romilly*, M.R., affirmed. SLARK *v.* DAKYNS - - - 35

EXCESSIVE CLAIM—Debtor's summons - 458
See STAYING PROCEEDINGS.

EXECUTION CREDITOR—*Bankruptcy—Trader Debtor—Notice to Sheriff of Liquidation Petition—Bankruptcy Act*, 1869, *s.* 87.] Where a sheriff has sold under an execution the goods of a person who is not evidently a trader, and notice of the filing of a liquidation petition is given to the sheriff under the 87th section of the *Bankruptcy Act*, 1869, it should give such information to the sheriff, that he may identify the debtor with the person whose goods have been sold, and may infer that he is a trader. *Ex parte* SPOONER. *In re* SMITH - - - - - - 168

2. —— *Resolution for Composition—Delivery of Writ of fi. fa. before passing of Resolution—Bankruptcy Act*, 1869, *s.* 126.] A resolution for composition has no retrospective effect so as to invalidate securities obtained by a creditor in the interval between the filing of the petition and the first meeting of creditors.—A creditor sued out a writ of *fi. fa.* and delivered it to the sheriff. Earlier in the same day the debtor filed a petition for liquidation or composition, and he afterwards obtained an injunction restraining the proceedings in the execution. At the first meeting of creditors a resolution was passed to accept a composition:—*Held* (affirming the decision of *Bacon*, C.J.), that the creditor was entitled to proceed with his execution. *Ex parte* JONES. *In re* JONES - - - - - - 663

—— Election of remedy—Action against sheriff - - - - 379
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EXECUTOR—Conversion—Compensation money for advowson - - - 610
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—— Deceased partner—Proof in bankruptcy 160
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—— Right of retainer - - - 68
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EXHIBITS—Proof at the hearing - - 239
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FIDUCIARY RELATION—*Directors—Purchase by Trustees—Charges of Fraud—Costs.*] The Defendants, in 1864, were four of the directors of a joint stock bank. In that year resolutions were passed to increase the capital by the issue of 20,000 new £50 shares, which were to be offered to the old shareholders at the rate of one new share for each old share held by them, each allottee paying for each share £25 premium, and £5 as a first call. The shares not taken up by them were to be disposed of by the directors at £30 premium. The directors entered into an arrangement with *S.*, for him to take at £30 premium all the shares not taken up by the old shareholders. In pursuance of this, 9778 shares were allotted to *S.*, who paid only £5 per share, it being arranged that the certificates for these shares should be withheld, that the bank should have a lien on them for the premiums, and that no transfer from him to any purchaser should be registered till the £30 per share on the shares transferred had been

FIDUCIARY RELATION—*continued.*

paid. *S.*, being unable to take up so many shares, applied to the Defendants to relieve him of some of them, and they severally took from him considerable numbers at £30 per share, and afterwards disposed of them at a profit, the £30 per share being paid to the bank at the times when the shares were respectively registered in the names of purchasers:—*Held* (affirming the decision of *Bacon*, V.C.), that the Defendants must respectively account to the bank for the profits made by them respectively by sale of the shares.—The bill, which was filed on behalf of the bank, alleged to the effect that the new capital had been created in pursuance of a scheme formed by the Defendants to procure its creation, not for the purpose of benefiting the bank, but with the view of themselves becoming possessed of some part of it for their own benefit, and that they improperly used their powers as directors for allotting shares to *S.*, with a view of themselves becoming possessed of them. The facts on which the relief granted by the Court was founded were not disputed, but a vast mass of evidence was gone into on the subject of the above allegations, for which, in the opinion of the Court of Appeal, there was no foundation. The bill, though prominently putting forward the alleged scheme as a ground of relief, also made a case for relief on the ground that the transaction was a purchase of trust property by trustees:—*Held*, that, as the bill made a case which entitled the Plaintiff to relief, which case was separable from the case of fraud, relief must be given; but that so much of the bill as was founded on the case of fraud ought to be dismissed with costs, and that the decree should give the Plaintiff no costs of the rest of the suit. PARKER *v.* MCKENNA - - - - 96

2. —— *Director—Agent—Dealings with Principal—Contributory—Call.*] Before the formation of a company for the purchase of certain property the vendors agreed with *H.* that he should become a director, they providing him with the forty shares necessary to qualify him. He thereupon signed the memorandum of association in respect of forty shares, and became a director. At a meeting of directors cheques were drawn on the bankers of the company and given to the vendors in payment of part of the purchase-money. One of these cheques being for the same amount as that due on *H.'s* shares was given by the vendors to *H.*, and was by him paid in to his own bankers. He then drew a cheque on his own bankers, and gave the cheque to the company in payment of the sum due on his shares. The company was afterwards ordered to be wound up:—*Held*, that *H.*, being a director of the company, could not retain money so paid to him by the vendors; that the money had never ceased to be the money of the company; that there had in fact been no payment by *H.* of the money due in respect of the shares; and that he was liable as a contributory in respect of these shares.—Decision of *Malins*, V.C., affirmed.—*Orgill's Case* (21 L. T. (N.S.) 221) disapproved of. *In re* CANADIAN OIL WORKS CORPORATION. HAY'S CASE - - - 593

FIRE INSURANCE—Option of purchase—Premises insured by lessor - - 386
See OPTION OF PURCHASE.

FIRST MEETING OF CREDITORS—Fresh first meeting - - - - 382
See MEETING OF CREDITORS. 1.

FORECLOSURE—*Mortgage—Dismissal of Bill for Redemption—Equitable Mortgage by deposit of Deeds—Consolidation of Mortgages.*] The rule that the dismissal of the bill in a redemption suit operates as a foreclosure of the mortgage does not apply to an equitable mortgage by deposit of title-deeds.—A mortgagor filed a bill for the redemption of a legal mortgage. The mortgagee, by his answer, alleged that he had advanced another sum of money on the deposit of the title-deeds of another estate, and he claimed to hold both estates till both debts were paid. The Plaintiff amended his bill by stating the allegations made by the Defendant, but before the bill came to a hearing he obtained an order, *ex parte*, dismissing the bill with costs. The mortgagee afterwards contracted to sell both the estates, and then filed a bill for the administration of the estate of the mortgagor, who was dead, praying for permission to carry out the sale, and for payment of his whole debt out of the mortgagor's estate:—*Held* (affirming the decision of *Hall*, V.C.), that the equitable mortgage was not foreclosed, and that the Plaintiff was entitled to the relief prayed for. MARSHALL *v.* SHREWSBURY - - - 250

—— Decree—Delivery up of deeds - - 12
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See UNDUE INFLUENCE.

FRAUDULENT DEVISES, STATUTE OF—*Real Assets—Alienation by Devisee—Equitable Mortgage—Priority over Creditor of Testator—Trustee—Breach of Trust—Charge on Trustee's beneficial Interest.*] An equitable deposit with memorandum of charge by a devisee is an alienation which *pro tanto* prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. 4, c. 104.—Where a person seised in trust for himself and another in common in fee retains the entire rents, the debt arising in favour of the co-tenant will not be charged, on the principle of *Morris* v. *Lixie* (1 Y. & C. Ch. 380), on the trustee's beneficial interest as against a purchaser without notice from him.—A testator, being seised of a house in trust for himself and *H.* as tenant in common in fee, made his will, by which he devised all his real estate to his wife in trust to buy herself an annuity, and subject thereto in trust for his two sons equally. The testator had received to his

FRAUDULENT DEVISES, STATUTE OF—*contd.*
own use the whole of the rents of the house, and died indebted to *H.* in a considerable sum on account of her share. The two sons deposited the title-deeds of the house with the Plaintiffs, accompanied by a memorandum charging their interests in the house with a sum of money advanced by the Plaintiffs, who had no notice of *H.*'s interest. *H.* afterwards filed a bill against the real and personal representatives of the testator, in which she established her right to one moiety of the house, and obtained a decree charging the amount of rents due to her on the testator's moiety of the house.—Demurrer to bill by Plaintiffs to establish their priority over *H.* overruled.—The *dictum* in *Coope* v. *Cresswell* (Law Rep. 2 Ch. 112, 122) followed.—*Carter* v. *Sanders* (2 Drew. 248) disapproved.—Decision of *Hall*, V.C., reversed. British Mutual Investment Company *v.* Smart - - - 567

FRAUDULENT PREFERENCE—*Liquidation by Arrangement—Application by a Creditor to use the Name of the Trustee.*] Where the result of recovering property alleged to have been delivered to a creditor by way of fraudulent preference would not be for the benefit of the creditors at large, but of an individual creditor who claims a security on it, the trustee ought not to take proceedings for the recovery of the property himself, nor will the individual creditor be allowed to take them in his name. *Ex parte* Cooper. *In re* Zucco - - - - - - 510

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GENERAL RULES IN BANKRUPTCY, 1870, rr. 67, 68 - - - - 218
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—— r. 266 - - - - 59, 215
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—— rr. 275, 295 - - - - 631
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—— r. 281 - - - - 304, 308
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—— r. 285 - - - - - 479
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GENERAL WORDS—Easement—Alteration of condition of tenement - - 582
See Alteration of Easement. 1.

GIFT TO A CLASS—*Designatio Personarum—Persons excepted by Name—Nephews and Nieces of A. living at his Death.*] A testatrix gave personal estate in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except *A.* and *B.*, as tenants

GIFT TO A CLASS—*continued.*
in common. Two nephews, who would otherwise have taken under the bequest, died before the testatrix, one before and the other after the will:—*Held* (affirming the decision of *Malins*, V.C.), that the gift was to a class, and not to designated persons, and therefore that there was no lapse, but the fund was divisible among those of the class who survived the testatrix. Dimond *v.* Bostock - - - - - - 358

HEIR—Mortgage of reversion - - 389
See Usurious Contract.

ILLEGAL COMPANY—Unregistered insurance company - - - - 542
See Mutual Insurance Society.

ILLEGAL COMPROMISE—Criminal proceedings
See Libel. [297

ILLEGAL POLICY—Marine insurance—Names of underwriters - - - 542
See Mutual Insurance Society.

IMPROVEMENTS—Combination of 667, 675, n.
See Infringement of Patent. 1, 2.

INDEMNITY—Promoters of company - 177
See Agreement to indemnify.

INFANT—Confirmation—Lady just of age 15
See Undue Influence.

—— Contract by—Ratification - - 373
See Contract by Infant.

INFRINGEMENT OF PATENT—*Combination—Sub-combination.*] A patent for a combination of several improvements is not infringed by using a combination of some only of those improvements. —Decree of *Bacon*, V.C., reversed.—*Lister* v. *Leather* (8 E. & B. 1004) observed upon. Clark *v.* Adie - - - - - 667

2. —— *Combination of some out of several Improvements.*] A patent was taken out for a brick-making machine by which the clay was pressed by a moveable table against wires, by which it was cut into bricks, and the bricks were then passed on to a moveable board. Another manufacturer used a similar moveable table and wires, but not the moveable board for receiving the bricks.—*Held*, that this was no infringement of the patent. Murray *v.* Clayton - 675, n.

INJUNCTION—Bankruptcy - - 222, 652
See Injunction in Bankruptcy. 1, 2.

—— Criminal proceedings - - - 64
See Restraining Criminal Proceedings.

—— Injury to reputation - - - 142
See Injury to Reputation.

—— Light and air - - - - 283
See Light and Air.

—— Nuisance—Misjoinder of owners of distant property - - - - 580
See Misjoinder.

—— Proceedings in Probate Court - - 440
See Restraining Proceedings in Probate Court.

—— Publication of apology - - - 297
See Libel.

—— Support to buildings—Minerals - 394
See Support to Buildings.

INJUNCTION—*continued.*
—— Trade-mark—Costs—Deception - 276
See Trade-mark.
—— Violation of undertaking - - 450
See Accommodation Works.
—— Waste—Sale of right of shooting - 355
See Waste.

INJUNCTION IN BANKRUPTCY—*Liquidation by Arrangement—Receiver—Taking Possession of Debtor's Business—Undertaking as to Damages—Bankruptcy Rules*, 1870, *r.* 260.] A petition for liquidation having been presented, a receiver was appointed and ordered to take possession of the fixtures and stock-in-trade at the debtor's brewery; and an injunction was granted restraining a mortgagee, who was in possession of the brewery under a bill of sale, from intermeddling with the chattels in the brewery. When the injunction was granted the receiver and the debtor gave undertakings to be answerable for damages. The mortgagee afterwards established his title to the brewery and the chattels in it, and then applied for an inquiry as to damages sustained by the occupation of the receiver:—*Held*, that the receiver must be treated as the agent of the creditors, and not of the mortgagee, and could not charge the mortgagee with the expense of carrying on the business; and that he was liable, under his undertaking, for damage for deterioration of the property, and for rent for use and occupation of the fixtures and stock-in-trade; and an inquiry was directed accordingly. *Ex parte* Warren. *In re* Joyce 222

2. —— *Liquidation—Suit in Chancery—Debt based on Fraud—Revivor against Trustee.*] *A.* filed a bill against *B.* praying that an agreement might be cancelled, and a sum of money paid under it repaid, on the ground of fraudulent misrepresentations by *B.* Before the suit came to a hearing *B.* became a liquidating debtor, and the suit was revived against his trustee. The trustee then applied to the Court of Bankruptcy for an injunction to restrain the suit in Chancery:—*Held*, that the Plaintiff had a right to prosecute his remedy against the debtor personally in the suit, notwithstanding the proceedings in liquidation; and the injunction was refused.—The Court of Bankruptcy will not restrain proceedings in a suit or action to which the discharge of the debtor in bankruptcy would be no defence. *Ex parte* Coker. *In re* Blake - - - 652

INJURY TO REPUTATION—*Libel—Injunction—Jurisdiction.*] This Court has no jurisdiction to restrain the publication of a libel as such, even if it is injurious to property.—Order of *Hall*, V.C., affirmed.—*Dixon* v. *Holden* (Law Rep. 7 Eq. 488) and *Springhead Spinning Company* v. *Riley* (Law Rep. 5 Eq. 551) overruled. Prudential Assurance Company *v.* Knott - - 142

INQUIRY—Damages—Costs of - - 334
See Costs of Inquiry.
—— Lunacy—Costs - - - - 75
See Costs in Lunacy.

INROLMENT OF DECREE—Appeal in winding-up - - - - - 316
See Appeal in Winding-up.

INSTALMENTS—Money—Payable by—Rescission of contract - - - 515
See Rescission of Contract. 2.

INSURANCE COMPANY—Costs of winding-up—Fund of policy-holders - - 1
See Marshalling. 1.

INTENTION TO ELECT - - - 239
See Election.

INTERFERENCE WITH MANAGEMENT OF COMPANY—*Company—Directors calling a Meeting—Jurisdiction.*] Where, by the articles of association of a company, the directors, and in the alternative a certain portion of the shareholders, can summon a meeting of the company, the Court will not order the directors to summon a meeting for the general purposes of the company.—Order of *Malins*, V.C., reversed. MacDougall *v.* Gardiner - - - - - - 606

INVENTORY—Reference to - - - 322
See Parcels in Deed.

ISSUES IN BANKRUPTCY—*Bankruptcy—Practice—Trial of Issue before Judge—Judge's Notes—Power of Court of Appeal to disregard finding of Judge—Bankruptcy Act*, 1869, *s.* 72.] Where an issue of fact has been tried before a Judge under the 72nd section of the *Bankruptcy Act*, 1869, and the Court of Appeal is furnished with the Judge's notes of the trial, they are conclusive as to the evidence adduced before him, and the Court will not receive the notes of a shorthand writer except by consent of both parties.—The Court of Appeal is not bound to accept as conclusive the finding of the Judge on the trial of such an issue. *Ex parte* Gillebrand. *In re* Sidebotham - - - - - 52

ISSUES IN CHANCERY SUIT—*Practice—Appeal from Order directing Issues—Discretion of Court.*] An appeal will lie from an order of a Judge of the Court of Chancery directing an issue before a jury; but if the Court of Appeal is of opinion that there is really a conflict of evidence, it will not interfere with the discretion of the Judge in directing an issue. Williams *v.* Guest - 467

JOINT AND SEPARATE ESTATES—Separate creditors—Duty of trustee - 479
See Discharge in Bankruptcy 2.

JUDGE'S NOTES—Shorthand notes—Evidence 52
See Issues in Bankruptcy.

JURISDICTION—Chancery—Injunction against grant of administration - - 440
See Restraining Proceedings in Probate Court.
—— Chancery—Restraining criminal proceedings - - - - - 64
See Restraining Criminal Proceedings.
—— Interference with management of company [606
See Interference with Management of Company.
—— Partition—Sale - - - - 469
See Partition Suit. 3.

LACHES—Undue influence—Setting aside security - - - - - 15
See Undue Influence.

LANDS INJURIOUSLY AFFECTED - 435, 459
See Compensation under Lands Clauses Act. 1—3.

LANDLORD AND TENANT—Option of purchase
See Option of Purchase. [386

LAPSE—Gift to a class - - - 358
See GIFT TO A CLASS.

LEASE—Agent for—Usual claims - - 622
See AGREEMENT FOR LEASE.

—— Mines—Lunatic—Conversion - - 79
See CONVERSION.

LEAVING ISSUE—Death in lifetime of parents [555
See DEATH COUPLED WITH A CONTINGENCY.

LEGAL ESTATE—Protection by - - 22
See PURCHASE FOR VALUE WITHOUT NOTICE.

LEVEL CROSSING—Railway—Change of condition of land - - - - 586
See ALTERATION OF EASEMENT. 2.

LIBEL—*Repeated Publication — Compromise of Criminal Proceedings—Duress.*] The prosecutors in a trade-mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months:—*Held*, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter.—Where an offence is of such a nature that the offender may be proceeded against either civilly or criminally, there is nothing illegal or improper in a compromise of the criminal proceedings taken against him.—Order of *Malins*, V.C., reversed. FISHER & COMPANY *v.* APOLLINARIS COMPANY - - 297

—— Injunction to restrain publication - 142
See INJURY TO REPUTATION.

LIEN—Breach of trust—Tenant in common 567
See FRAUDULENT DEVISES, STATUTE OF.

—— Solicitor - - - - - 291
See SOLICITOR'S LIEN.

—— Solicitor—Documents - - - 340
See PRODUCTION OF DOCUMENTS. 2.

—— Vendor's—Shipbuilding contract—Bill of exchange - - - - 405
See SECURITIES FOR BILLS OF EXCHANGE. 2.

LIFE INSURANCE—Winding-up—Proof for value of policy - - - - 648
See MUTUAL CREDITS.

LIGHT AND AIR—*Ancient Lights—Enjoyment from Time immemorial—Enlargement of Windows—Injunction or Damages—Prescription Act* (2 & 3 *Will.* 4, *c.* 71).] In a suit to restrain the Defendant from building so as to obstruct the Plaintiff's ancient lights, it was proved that for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of the Plaintiff and the Defendant, but there was no evidence of there ever having been any unity of title; and it was proved that before the unity of possession commenced the access of light to the windows had been enjoyed as far back as living memory went:—*Held* (affirming the decision of the Master of the Rolls), that the Plaintiff had established his title to the access of light, by

LIGHT AND AIR—*continued.*

proof of enjoyment from time immemorial, independently of the statute 2 & 3 Will 4, c. 71; for that the statute does not take away any of the modes of claiming easements which existed before its passing:—*Held*, also, that the fact that some of the windows had been considerably enlarged did not take away the right to an injunction; and that the Plaintiff ought not to be put upon the terms of restoring the windows to their former size. AYNSLEY *v.* GLOVER - - - 283

LIMITED FUND—Insurance company—Costs in winding-up - - - - 1
See MARSHALLING. 1.

LIQUIDATION BY ARRANGEMENT—Close of liquidation - - - 479, 490
See CLOSE OF LIQUIDATION. 1, 2.

—— Debt based on fraud - - - 652
See LIQUIDATION IN BANKRUPTCY. 2.

—— Discharge of Debtor - - 255, 479
See DISCHARGE IN BANKRUPTCY. 1, 2.

—— Fraudulent Preference - - - 510
See FRAUDULENT PREFERENCE.

—— Meeting of creditors—Fresh first meeting
See MEETING OF CREDITORS. 1. [382

—— Meeting of creditors—Registration of resolution - - - - - 631
See MEETING OF CREDITORS. 2.

—— Proof against co-partner - - 160
See PROOF AGAINST CO-PARTNER. 2.

—— Proof—Damages—Detinue - - 234
See DAMAGES IN DETINUE.

—— Staying proceedings in bankruptcy 59, 215, [458
See STAYING PROCEEDINGS IN BANKRUPTCY. 1, 2, 3.

LUNACY—Conversion of lunatic's real estate 79
See CONVERSION.

—— Costs of inquiry as to lunacy - - 75
See COSTS IN LUNACY.

—— Trustee Act—Appointment of new trustee
See TRUSTEE ACT. 1, 2, 3. [55, 272, 273

—— Settlement by lunatic—Proceedings to impeach - - - - 192
See SETTLEMENT BY LUNATIC.

—— Stop order by assignee of next of kin 73
See STOP ORDER.

MANAGEMENT — Company — Interference of Court - - - - 606
See INTERFERENCE WITH MANAGEMENT OF COMPANY.

MARINE INSURANCE—Mutual insurance society
See MUTUAL INSURANCE SOCIETY. [542

MARSHALLING—*Winding-up—Insurance Company—Costs of Realising Assets—Limited Fund of Policy-holders—7 & 8 Vict. c.* 110.] An insurance company of unlimited liability, formed under the 7 & 8 Vict. c. 110, granted policies of insurance, by the terms of which the insured had no claim against the shareholders beyond the amounts unpaid on their shares. The company was ordered to be wound up, and the assets of the company, including the full amount payable on the shares, were applied in paying the policy-holders and the general creditors *pro ratâ*; and the balance due

MARSHALLING—*continued.*
to the general creditors was paid by additional calls on the shareholders:—*Held* (affirming the decision of the Master of the Rolls), that the costs of calling up the unpaid capital, as well as the general costs of the winding-up, must be borne wholly by the shareholders, and that no part was payable out of the limited fund applicable to the claims of the policy-holders. *In re* AGRICULTURIST CATTLE INSURANCE COMPANY. *Ex parte* OFFICIAL MANAGER - - - - - 1

2. —— *Will—Specific Devise—Residuary Devise—1 Vict. c. 26, s. 24—Costs—Plaintiff, a Devisee, claiming also unsuccessfully as a Creditor.*] A residuary devise of real estate is still specific notwithstanding the 24th section of the *Wills Act*. Therefore, where the personal estate of a testator is insufficient for the payment of his debts, the specific devisees must contribute rateably with the residuary devisee.—The decision in *Hensman* v. *Fryer* (Law Rep. 3 Ch. 420) on this point followed. —The decision of *Bacon*, V.C., reversed.—The Plaintiff in an administration suit was a specific devisee, and also claimed to be a creditor of the testator. His title as devisee was admitted, but he failed to establish his claim as a creditor:—*Held*, that he must pay the costs of his unsuccessful attempt to establish his claim as a creditor. LANCEFIELD *v.* IGGULDEN - - - 136

MEETING OF CREDITORS—*Liquidation—Power to call fresh first Meeting.*] A debtor, who was a member of a partnership firm, filed a petition for liquidation. In the statement produced by the debtor to the first meeting of his creditors, he made no distinction between his joint and separate debts and assets. The creditors passed a resolution for liquidation, but, by reason of the irregularity of the debtor's statement, the resolution was not registered. The debtor then obtained an order to summon a fresh first meeting:—*Held*, that, inasmuch as no valid resolution could have been passed at the meeting, and, consequently, the creditors had had no opportunity of expressing their opinion as to a liquidation, the Court was justified in permitting a fresh first meeting.—*Ex parte Cobb* (Law Rep. 8 Ch. 727) explained.—*Ex parte Cockayne* (Law Rep. 16 Eq. 218) approved. *Ex parte* GIBBS. *In re* WEBB [382

2. —— *Liquidation—Registration of Resolutions—Offer of Composition refused—Resolution not reduced to Writing—Adjournment of Meeting—Offer accepted at adjourned Meeting—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-ss.* 7, 8), 126—*Bankruptcy Rules*, 1870, *rr.* 275, 295.] At the first meeting under a liquidation petition the debtor offered a composition. His solicitor took the votes of the creditors and found that the requisite majority in favour of it could not be obtained, but the question was not formally put from the chair, nor was any resolution reduced into writing. A resolution to adjourn the meeting was then carried, and at the adjourned meeting the debtor's offer was accepted, and the resolution to accept it was duly confirmed at the second meeting. The resolution for adjournment was written and signed, and filed with the proceedings:—*Held* by the Chief Judge (reversing the decision of a County Court Judge), that the Court could have no regard to any resolution which was not written and signed, and that, consequently, the resolution accepting the composition was valid, and must be registered:—*Held*, on appeal, that the adjournment and all the subsequent proceedings were invalid, the offer having been rejected by the first meeting. *Ex parte* TILL. *In re* RATCLIFFE - - 631

—— Refusal to pass resolution - - 479
See DISCHARGE IN BANKRUPTCY. 2.

—— Country—Words of petition - - 618
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MEETING OF SHAREHOLDERS—Jurisdiction of Court to order meeting to be held 606
See INTERFERENCE WITH MANAGEMENT OF COMPANY.

MINE—Lease of—Lunatic—Conversion - 79
See CONVERSION.

—— Phosphate—Trading—Bankruptcy - 172
See DEBTOR'S SUMMONS. 1.

MINERALS—Injury to buildings on surface 394
See SUPPORT TO BUILDINGS.

—— Lands taken by corporation—Parliamentary notice - - - - 92
See MOTION TO SET ASIDE AWARD.

MINING LEASE—Usual clauses - - 622
See AGREEMENT FOR LEASE.

MISJOINDER—*Nuisance—Injunction—Form of Decree—Costs.*] The owners of distinct properties joined as Plaintiffs in a suit to restrain a nuisance. The Court considered that a sufficient case of nuisance had, in the case of the first Plaintiff, not been made out, but in the case of the second Plaintiff had been made out. A decree was made for an injunction so far as regarded the second Plaintiff, and for the Defendant to pay him his costs; the bill as regarded the first Plaintiff to be dismissed, and the costs occasioned by the addition of the first Plaintiff to be deducted from the costs so to be paid by the Defendant.—Decree of *Bacon*, V.C., varied. UMFREVILLE *v.* JOHNSON - - - - 580

MISTAKE—Composition with creditors—Statement of debts - - - 304
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—— Name of company - - - 470
See WINDING-UP PETITION. 2.

—— Omission to register contract for paid-up shares - - - - 157
See CONTRACT FOR PAID-UP SHARES. 1.

—— Value of estate sold - - - 424
See SPECIFIC PERFORMANCE WITH COMPENSATION.

MORTGAGE—Building society - - 41
See BUILDING SOCIETY.

—— Equitable—Alienation by devisee - 567
See FRAUDULENT DEVISES, STATUTE OF.

—— Equitable—Foreclosure—Effect of dismissal of redemption suit - - - 250
See FORECLOSURE.

—— Lands taken under Lands Clauses Act—Service on mortgagees—Costs - 328
See COSTS UNDER LANDS CLAUSES ACT. 2.

MORTGAGE—*continued.*
—— Policy of insurance—Set-off—Winding-up—Bankruptcy - - - - 648
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—— Register county - - - 8
See YORKSHIRE REGISTRY ACT.
—— Reversion—Expectant heir - - 389
See USURIOUS CONTRACT.

MOTION TO ENFORCE COMPROMISE - 534
See COMPROMISE, HOW ENFORCED.

MOTION TO SET ASIDE AWARD—*Arbitration—Time for Complaint—Notice of Motion—Parliamentary Notice—Extent of Land taken—Minerals under Land—Waterworks Clauses Act*, 1847 (10 *Vict. c.* 17), *s.* 18.] Where a submission to arbitration has been made a rule of the Court of Chancery, service of a notice of motion to set aside the award is a complaint within the meaning of 9 & 10 Will. 3, c. 15, s. 2, and is in time, although the motion will not be heard until after the time limited by the Act.—A corporation served the usual notice on a landowner before applying to Parliament for power to take his land. The Act when obtained gave them power to take more of his land than was described in the notice:—*Held*, that the corporation was not prevented from taking more land than was described in the notice:—*Held*, that under the circumstances the corporation were not obliged to take the mines and minerals under the land taken by them.—Decision of *Malins*, V.C., affirmed. *In re* CORPORATION OF HUDDERSFIELD AND JACOMB 92

MUTUAL CREDITS—*Bankruptcy—Set-off—Life Assurance Company in process of Winding up—Estimated Value of Policy—Money advanced on Policy—Bankruptcy Act*, 1869, *s.* 39.] A policy-holder in a life assurance company borrowed money from the company on his policy. Before the death of the assured the company was wound up, and an estimated value was put upon the policy. Afterwards the policy-holder filed a petition for liquidation, and a trustee was appointed. The official liquidators of the company proved against the estate of the policy-holder for the amount advanced to him, and the trustee claimed to set off the estimated value of the policy:—*Held*, that there were no mutual debts or mutual dealings within the 39th section of the *Bankruptcy Act*, 1869, and that no set-off could be allowed. *Ex parte* PRICE. *In re* LANKESTER [648

MUTUAL INSURANCE SOCIETY—*Company—Marine Insurance—Names of Underwriters—30 Vict. c.* 23, *s.* 7—*Winding-up—Illegal Company—Association for Gain—Companies Act*, 1862, *s.* 4—*Delay.*] By the rules of a mutual marine insurance association formed in 1867, the members severally and respectively agreed to insure each other's ships for a year from the day named as the commencement of the risk. The two managers were to sign the policies, and their signatures were to bind the members as if each member had signed. The premiums were to be paid in advance, losses were to be paid out of the reserved fund thus created, and if it proved insufficient, the members were to contribute the deficiency *pro ratâ* according to the amounts for which they

MUTUAL INSURANCE SOCIETY—*continued.*
were insured. The managers were authorized to issue policies to members for periods less than a year, or for special risks either in time or voyage policies at special rates of premium, to which the reserve fund should in no way apply. The association was not registered or incorporated, and persons became members by effecting a mutual policy. Its policies were signed only by the managers "*per procuration* of the several members of the *Arthur Average Association* for insuring each other's ships." The managers issued special rate policies to a large amount to persons who had not taken mutual policies. In 1870 an order was made for winding up the association. *H. & Co.*, who were holders of special rate policies, but had not taken out any mutual policies, were found creditors to a large amount on their special rate policies. On an application by a contributory to vary the certificate by expunging their debt:—*Held*, by the Master of the Rolls (1), that the association came within the *Companies Acts*, 1861, s. 4, and ought to have been registered; that it was therefore an illegal company, and that an order for winding it up ought not to have been made, but that this objection could not be entertained on the present application:—(2.) That the policies of *H. & Co.* were void under 30 Vict. c. 23, s. 7, because they did not specify the names of the subscribers or underwriters:—(3.) That those policies were also void as being *ultrâ vires*, for that the rules only authorized the managers to issue special rate policies to persons who were already members by having taken out policies of mutual insurance:—*Held*, on appeal, that the policies were void for non-compliance with 30 Vict. c. 23, s. 7. *In re* ARTHUR AVERAGE ASSOCIATION FOR BRITISH, FOREIGN, AND COLONIAL SHIPS. *Ex parte* HARGROVE & CO. - 542

NEPHEWS AND NIECES—Living at death of *A.*
See GIFT TO A CLASS. [358

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—— Lunatic—Stop order - - - 73
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NOTICE—Act of bankruptcy - - 168
See EXECUTION CREDITOR. 1.
—— Act of bankruptcy—Protected transaction [267
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NUISANCE—Misjoinder of owners of distinct properties - - - - 580
See MISJOINDER.

OPTION OF PURCHASE—*Landlord and Tenant—Fire Insurance.*] Under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part-payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this, brought ejectment against him:—*Held*, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase. REYNARD *v.* ARNOLD - 386

ORDER—Decree and order on motion drawn up together—Appeal - - - 230
See APPEAL FROM PART OF DECREE.

—— Inrolment of winding-up - - 316
See APPEAL IN WINDING-UP.

—— Issue before jury—Appeal - - 467
See ISSUES IN CHANCERY SUIT.

—— Supervision—Wishes of creditors - 618
See WINDING-UP PETITION. 3.

—— Winding up - - - 188, 470, 618
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PAID-UP SHARES—Contract for—Companies Act, 1867, s. 21 - - - 157, 614
See CONTRACT FOR PAID-UP SHARES. 1, 2.

—— Director—Profit by - - - 593
See FIDUCIARY RELATION. 2.

PARCELS IN DEED—*Reference to Contemporaneous Inventory—Enlarging Operation of Deed.*] A mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brass work, wrought and cast iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock-in-trade in and upon the before-mentioned foundry, workshops, and premises." Then came this clause: "The contents of the twenty preceding sheets is a

PARCELS IN DEED—*continued.*
complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signature of the mortgagors:—*Held* (affirming the decision of the Chief Judge), that the stock-in-trade was not included in the mortgage. *Ex parte* JARDINE. *In re* MCMANUS - - - - 322

PARTIES TO ADMINISTRATION SUIT—*Practice—One Executor not a Party to the Suit*—15 & 16 *Vict. c.* 86, *s.* 42, *rr.* 1, 6.] A testator appointed three executors, and made his executors and two other persons his residuary legatees. All the executors proved, and one of them filed a bill for the administration of the estate, and for a partition, to which another of the executors was made sole Defendant. The remaining executor and also the other two residuary legatees were served with a copy of the decree:—*Held*, that the bill could not be sustained without making the remaining executor a party Defendant. LATCH *v.* LATCH - - - - - - 464

PARTITION SUIT—*Sale—Partition Act* (31 & 32 *Vict. c.* 40), *s.* 9—*Certificate—Further Consideration.*] A decree in a partition suit directed inquiries as to the persons interested, and whether a sale would be more beneficial than a partition, and if so found, directed a sale. The sale took place before the certificate was made:—*Held*, (affirming the decision of *Bacon*, V.C.), that the purchaser was entitled to be discharged, but that the decree was not wrong in directing a sale without reserving further consideration. POWELL *v.* POWELL - - - - - 130

2. —— *Sale—Partition Act*—31 & 32 *Vict. c.* 40, *s.* 5—*Sale of Share by Valuation.*] Where in a partition suit one of the part owners asks for sale and others ask for partition, the Court has not, under 31 & 32 Vict. c. 40, s. 5, power to order that the part owner who asks for a sale shall sell to the others his share at a valuation, and to order that a partition amongst the others shall then be made. Decree of the Master of the Rolls varied. WILLIAMS *v.* GAMES - - - - 204

3. —— *Partition Act* (31 & 32 *Vict. c.* 40), *ss.* 3, 4—*Decree—Compulsory Sale.*] In 1864 a decree was made for a partition, liberty being given to carry in proposals for a sale before the commission should be issued. No commission was issued, and after the *Partition Act* of 1868 had come into operation a supplemental bill was filed praying for a sale or a partition:—*Held*, that the rights of the parties under the decree were not taken away by the *Partition Act*, and that the Court had not now power to compel a sale. —Decree of *Bacon*, V.C., affirmed. PRYOR *v.* PRYOR - - - - - - 469

PARTNERSHIP—Bankruptcy—Proof by executors of deceased partner - - 160
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—— Bankruptcy—Unregistered company—Proof by liquidator against bankrupt contributory - - - - 48
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—— Debt by deceased partner—Retainer of assets by surviving partner - - 68
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See Restraining Proceedings in Probate Court.
PRODUCTION OF DOCUMENTS — *Winding-up Petition — Cross-examination of Secretary — Production of Company's Books on Cross-examination —Subpœna duces tecum.*] A petition for winding up a company having been presented by a shareholder, the secretary filed an affidavit in opposition to the petition, and was cross-examined by the Petitioner before a special examiner. On his cross-examination, he was called on to produce the books of the company, which he refused to do. *Malins*, V.C., accordingly, on the application of the Petitioner, made an order that the company, by their secretary, should produce before the special examiner, upon the cross-examination of the secretary, the books and papers which they had had notice to produce:—*Held*, that the Petitioner had a right to the production of the company's books and papers on the cross-examination of the secretary for the purpose of testing his evidence, but for no other purpose; and that the order of *Malins*, V.C., was right both in form and substance. *In re* Emma Silver Mining Company - - - - - - 194
2. —— *Practice—Solicitor's Lien.*] A Defendant, shortly after filing an affidavit as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solicitors. The Plaintiff applied for production of the documents, which the Defendant resisted on the ground that they were in the possession of his former solicitors, who claimed a lien on them:—*Held* (affirming the decision of *Bacon*, V.C.), that an order for production must be made, with liberty to apply in case the Defendant found it impossible to produce the documents, the Plaintiff not to attach the Defendant without leave of the Court.—*Per James*, L.J.:—A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the cause to production. Vale *v.* Oppert - - 340
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PROOF AGAINST CO-PARTNER — *Unregistered Company — Winding-up—Proof against Estate of Bankrupt Contributory in competition with Separate Creditors—Companies Act*, 1862, *s.* 95, *sub-ss.* 5, 199, 200, 204.] Where an unregistered company is wound up under the 199th section of the *Companies Act*, 1862, and a contributory becomes bankrupt, the official liquidator may prove under sect. 95, sub-sect. 5, of the Act for any sum due from the bankrupt's estate as a separate debt in competition with the separate creditors, in like manner as in the case of a registered company. *Ex parte* Ball. *In re* Adams - - 48
2. —— *Liquidation—Debt—Proof by Executor of deceased Partner.*] By a deed of partnership it was provided that in case of the death of any one of the partners, his share in the capital of the partnership should be taken by the survivors at its value in the books; and that the amount due to the executors of the deceased partner should be paid to them by instalments. One of the partners died, and his executors allowed his share in the capital to remain with the surviving partners at interest. Six years afterwards the surviving partners filed a liquidation petition, there being still in existence debts of the partnership incurred during the lifetime of the deceased partner:—*Held* (reversing the decision of *Bacon*, C.J.), that the executors could not prove in the liquidation for the amount due to them from the partnership. *In re* Dixon. *Ex parte* Gordon - - 160
PROPERTY—Injury to - - - 142
See Injury to Reputation.
PROSPECTIVE VALUE — Compensation under Lands Clauses Act - - - 435
See Compensation under Lands Clauses Act. 1.
PROTECTED DEALING WITH BANKRUPT—*Bankruptcy — Notice of Act of Bankruptcy—Non-compliance with Debtor's Summons — Bankruptcy Act*, 1869, *ss.* 6, 94.] The non-compliance with a debtor's summons is a completed act of bankruptcy available against the debtor for adjudication on the expiration of the time limited by the *Bankruptcy Act*, 1869, sect. 6, sub-sect. 6. Therefore, if notice of such non-compliance be given to another creditor before any petition for adjudication has been filed, it will prevent such creditor from availing himself of the protection of sect. 94. *Ex parte* Hankin. *In re* Buchan - - - - - - 267
PROTECTION OF LEGAL ESTATE—Purchase without notice - - - 23
See Purchase for Value without Notice.

PROVISO FOR SECURITY—Mining lease—Usual clauses - - - - 622
See AGREEMENT FOR LEASE.

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See LIBEL.

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PURCHASE FOR VALUE WITHOUT NOTICE—*Mortgage—Fraud—Legal Estate—Purchaser for Valuable Consideration—Trustees—Receipt—Recital—Estoppel—Evidence—Admission.*] Two trustees, one of whom was a solicitor, advanced money on mortgage. The mortgagor, with the concurrence of the solicitor trustee, sold part of the mortgaged property without disclosing the mortgage. Regular conveyances in fee to the purchasers were executed by the mortgagor, containing a recital that he was seised or otherwise well and sufficiently entitled in fee simple. The solicitor trustee received the purchase-money, and retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation of the solicitor trustee, that the property was then about to be sold by the mortgagor. Soon afterwards the solicitor trustee absconded, and the other trustee then filed a bill against the mortgagor and the purchasers, praying for foreclosure against them:—*Held*, that though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the reconveyance, which, having been obtained by fraud, must be cancelled; and that they had purchased only the equity of redemption:—*Held*, that under the form of conveyance adopted, neither the Plaintiff nor the mortgagor was estopped from denying that the legal estate had passed by the conveyance to the purchasers:—*Held*, that a decree must be made against the purchasers, but for foreclosure and not for sale; and that the purchasers would not be ordered to deliver up the deeds which were in their possession.—A mortgage deed could not be produced, and a copy purporting to have been furnished by the solicitor who held the deed was produced on behalf of the Plaintiff as evidence of the deed; the Plaintiff also deposed to the existence of the mortgage. The Defendants had in their answers not expressly challenged the mortgage deed, and had admitted that there had been a reconveyance of part of the property comprised in the mortgage:—*Held*, that as against these Defendants the mortgage deed was sufficiently proved.—Decree of *Bacon*, V.C., affirmed with variations. HEATH *v.* CREALOCK - - - - - 22

PURCHASE-MONEY—Apportionment - 319
See APPORTIONMENT.

—— Lien for—Bills of exchange - - 405
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—— Contract for paid-up shares - - 157
See CONTRACT FOR PAID-UP SHARES. 1.

—— Resolution for—Second composition - 208
See RESOLUTION FOR COMPOSITION. 2.

—— Resolution for liquidation - - 631
See MEETING OF CREDITORS. 2.

REGISTRATION OF BILL OF SALE—*Defeasance or Condition—Formal Possession—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 2, 7.] A bill of sale of chattels, with power to take immediate possession, was expressed to be made in consideration of an advance of £130 to be repaid by certain instalments without interest, the whole to become payable on default in any instalment. In fact, the sum advanced was only £100, the mortgagee, who was a money lender, charging the £30 by way of bonus and interest. A written memorandum was signed by the mortgagor, at the same time as the bill of sale, which stated that the £30 was to be paid in full, notwithstanding that the money secured by the bill of sale might be repaid, or the mortgagee's rights under it enforced, before the expiration of the time limited for payment. The bill of sale was registered: the memorandum was not:—*Held* (reversing the decision of the Chief Judge), that the memorandum was not a condition within the meaning of sect. 2 of the *Bills of Sale Act*, 1854, and that its not being registered did not affect the validity of the bill of sale. *Ex parte* COLLINS. *In re* LEES - 367

REINVESTMENT OF PURCHASE-MONEY—*Money to be invested in Land—Buildings—Repairs—Permanent Improvements.*] Money which, under the provisions of a deed, will, or private estate Act, is to be invested in the purchase of land, as well as money so to be invested by virtue of the *Lands Clauses Act* or the *Settled Estates Act*, will in a proper case be ordered by the Court

REINVESTMENT OF PURCHASE-MONEY—*continued.*
to be employed in erecting new buildings on land already settled to the same uses. But the Court will not sanction its being laid out in repairs, or in permanent improvements not placing new buildings on the land. DRAKE *v.* TREFUSIS 364

REPAIRS—Reinvestment of purchase-money 364
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RES JUDICATA — Execution creditor — Action against sheriff - - - 379
See BANKRUPTCY JURISDICTION.

RESCISSION OF CONTRACT—*Bankruptcy—Misrepresentation—Purchase by Debtor on Credit pending Bankruptcy Proceedings.*] On the 23rd of November *S.* was served with a debtor's summons for a debt slightly exceeding £50, and on the 1st of December committed an act of bankruptcy by non-compliance with it. On the 3rd of December the creditor filed and served a petition for adjudication. On the 5th of December *S.* bought wool at an auction, and called for it on the 12th. The vendor, being unaware of his embarrassed circumstances, allowed him to take it away without his paying for it, and without his making any representation as to payment. On the 14th (Monday) *S.* was adjudged bankrupt, not having taken any steps to oppose the adjudication. He had not sold any of the wool, nor did it appear that he had attempted to raise money on it:—*Held* (affirming the decision of the Chief Judge, who had reversed the decision below), that the trustee was entitled to retain the wool as against the vendor, for that the above facts did not furnish sufficient reason for assuming that *S.* did not intend to pay for the wool.—*Semble*, that if it had been made out that *S.* did not intend to pay for the wool, the vendor would have been entitled to rescind. *Ex parte* WHITTAKER. *In re* SHACKLETON - - - - 446

2. —— *Fraud—Agent—Engineer—Certificate.*] A telegraph works company agreed with a telegraph cable company to lay a cable, the cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the works company when they received the instalments from the cable company:—*Held*, that, under the circumstances, the agreement between the engineer and the works company was a fraud, which entitled the cable company to have their contract rescinded, and to receive back the money which they had paid under that contract.—*Per James*, L.J.:—Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first-named principal to have the contract rescinded, and to refuse to proceed with it in any shape.—*Per Mellish*, L.J.:—As the works company had by their fraudulent conduct prevented the cable company from having the full benefit of the contract, the cable company were entitled to have the contract rescinded.—Decree of *Malins*, V.C., affirmed. PANAMA AND SOUTH PACIFIC TELEGRAPH COMPANY *v.* INDIA RUBBER, GUTTA PERCHA, AND TELEGRAPH WORKS COMPANY 515

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RESIDUARY DEVISE—Marshalling - - 136
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RESOLUTION FOR COMPOSITION—*Bankruptcy Act*, 1869, *s.* 126—*Registration of Resolutions—Answer by Debtor to Inquiries.*] At a meeting of creditors under a petition for liquidation the solicitor of a creditor asked the debtor whether a certain letter was in his handwriting. He replied that it was not. He was then asked whether it had been written by his authority. His solicitor thereupon asked to see it. This was refused, and the debtor, under the advice of his solicitor, declined to answer the question, and the examination was dropped, without the nature of the letter being made known to the meeting. Resolutions for accepting a composition were then passed:—*Held* (affirming the decisions of the Registrar, the County Court Judge, and the Chief Judge), that there had been no such refusal by the debtor to give information as would render the resolutions invalid. *Ex parte* MACKENZIE. *In re* HELLIWELL - - - - 88

2. —— *Bankruptcy—Proceedings pending in a former Composition—Bankruptcy Act*, 1869, *s.* 126—*Registration of Resolution.*] When a resolution for composition has been passed which is capable of being enforced against a debtor, he cannot present a second petition for liquidation or composition: and any resolution passed under such a petition is void, and ought not to be registered. *Ex parte* SYDNEY. *In re* SYDNEY [208

RESTRAINING CRIMINAL PROCEEDINGS — *Jurisdiction—Injunction.*] Unless the cases raised and the objects sought are identical the Court will not prevent a Plaintiff in this Court from proceeding in a criminal Court against the Defendants to the suit in this Court.—*Mayor of York* v. *Pilkington* (2 Atk. 302) commented on.—Decision of the Master of the Rolls affirmed. SAULL *v.* BROWNE - - - - - 64

RESTRAINING PROCEEDINGS IN PROBATE COURT—*Injunction—Court of Probate—Grant of Administration—Deed.*] By a deed made between the residuary legatee under a will and some of the other next of kin, after reciting that the will had been made, but a draft only of it had been found, and that the other next of kin were desirous of giving full effect to the will, the other next of kin assigned to the residuary legatee the estate of the testator. One of the other next of kin afterwards applied for administration to the estate of the testator as if he had died intestate:—*Held*, that the Court of Chancery had jurisdiction to restrain proceedings in the Court of Probate; but that on the construction of the deed there was nothing in it to prevent the other next of kin from obtaining administration.—Order of *Bacon*, V.C., discharged. WILCOCKS *v.* CARTER [449

RESULTING TRUST—Purchase in joint names
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RESULTING TRUST—*continued.*
—— Transfer into joint names of transferor and son-in-law - - - - 431
See ADVANCEMENT. 2.

RETAINER BY EXECUTOR—*Debt not yet ascertained—Partnership Accounts.*] A testator, who was a member of a partnership firm, appointed one of his surviving co-partners and another person his executors:—*Held* (affirming the decision of *Hall*, V.C.), that the surviving partner was not deprived of his right to retain assets in his hands in satisfaction of the liability of the testator to the firm, by the fact that the amount of the liability had not been ascertained, no accounts of the partnership having been taken. *In re* MORRIS'S ESTATE. MORRIS *v.* MORRIS - 68

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—— Resolution for composition—Securities 663
See EXECUTION CREDITOR. 2.

REVERSION—Mortgage of—Expectant heir 389
See USURIOUS CONTRACT.

REVIVOR AND SUPPLEMENT—Bankrupt—Trustee - - - - 652
See INJUNCTION IN BANKRUPTCY. 2.

RIGHT OF SPORTING—Sale of—Cutting timber - - - - 355
See WASTE.

RIGHT TO TENDER PROOF—*Bankruptcy—Proof of Debt—Vote for Trustee—Person appointed by the Court of Chancery—Bankruptcy Rules*, 1870, *rr.* 67, 68.] A creditor of a bankrupt died before the commencement of the bankruptcy, and his estate was administered in Chancery in a suit instituted by a creditor against the administratrix. The Court of Chancery appointed a person who was not the administratrix to prove the debt against the bankrupt's estate:—*Held*, that the person appointed by the Court had a right to prove the debt, and also to vote for the appointment of a trustee at the meeting of creditors.—The 67th and 68th Rules of the *Bankruptcy Rules*, 1870, only apply to ordinary cases, and not to proofs by persons appointed by the Court of Chancery or of Lunacy to represent the creditor's estate. *Ex parte* HARE. *In re* ENGLAND - - - - - - - 218

RIPARIAN OWNER—*Tidal River—Access—Right, Public or Private—Embankment—Thames Conservancy*—20 & 21 *Vict. c.* cxlvii., *ss.* 53, 179.] The owner of land on the bank of a tidal river has only a right of access to the river as one of Her Majesty's subjects, and has not the same easements or private rights as those of the owner of land on the bank of an inland stream.—Under the *Thames Conservancy Act*, the conservators had power to grant to the owner of any wharf a license to make an embankment into the body of the river, and by sect. 179 the rights of owners of land adjoining the river were saved:—*Held*, that the conservators had power to grant a license to embank, although the embankment would cut off all access to one side of the adjoining wharf, the right interfered with not being a private right, and not being saved by sect. 179.—Decree of *Malins*, V.C., reversed. LYON *v.* FISHMONGERS' COMPANY - - - - - 679

SALE—Goods—During proceedings in bankruptcy - - - - 446
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See VENDOR'S LIEN ON GOODS.
—— Lunatic's real estate—Conversion - 79
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—— Partition suit - - - 204, 469
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SECRETARY OF COMPANY—Cross-examination—Production of documents - 194
See PRODUCTION OF DOCUMENTS. 1.

SECURITIES—Composition with creditors—Retrospective effect of resolution - 663
See EXECUTION CREDITOR. 2.

SECURITIES FOR BILLS OF EXCHANGE—*Double Insolvency—Doctrine of Ex parte Waring—Application of Securities—Reduction of Proof.*] All the parties to certain bills of exchange, the payment of which was secured as between some of them, became insolvent—one of them (a company) being ordered to be wound up. The securities were realized, and the proceeds paid to the bill-holders, upon the principle of *Ex parte Waring* (19 Ves. 345). After the bills had matured, but before the securities were realized, the holders had proved against the company for the full amount:—*Held* (affirming the decision of the Master of the Rolls), that the proof must be reduced by the amounts received by the bill-holders from the securities, and any dividends received on the excess of the original over the reduced proof must be refunded. *In re* BARNED'S BANKING COMPANY. *Ex parte* JOINT STOCK DISCOUNT COMPANY - - - - - - 198

2. —— *Insolvency of Drawer and Acceptor—Doctrine of Ex parte Waring—Shipbuilding Contract—Bills given to pay Instalments of Purchase-money—Vendor's Lien for unpaid Purchase-money.*] A contract for the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion and transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt, and the ship was completed by his trustee. The bill-holders having claimed a lien on the ship:—*Held* (affirming the decision of the Chief Judge, reversing that of the County Court

SECURITIES FOR BILLS OF EXCHANGE — *continued.*

Judge), that the principle of *Ex parte Waring* (19 Ves. 345) was not applicable, and that the bill-holders had no lien on the ship. *Ex parte* Lambton. *In re* Lindsay - - - 405

3. —— *Doctrine of Ex parte Waring—Double Insolvency.*] *M.*, a foreigner, drew a bill on *Y.*, which was accepted, and remitted a bill of exchange to cover it. Before the acceptance became payable *Y.* filed a petition for liquidation, and the remittance came in specie to the hands of the receiver appointed in the liquidation. Shortly afterwards resolutions were duly registered for accepting a composition payable by instalments. *M.* was also insolvent, and had, since making the remittance, entered into a composition with some of his creditors, but had not made any cession of his property, and remained liable to be sued on the bills. He was indebted to *Y.* on the account between them beyond £2000: —*Held*, that as *M.*, though unable to pay his debts, was liable to be sued, was free to deal with his property as he pleased, and was not subject to the jurisdiction of any Court, the doctrine of *Ex parte Waring* (19 Ves. 345) did not apply, and that the holder of *Y.'s* acceptance could not claim payment out of the remittance. *Ex parte* General South American Company. *In re* Yglesias & Co. - - - - - - 635

4. —— *Appropriation of Remittances to cover Acceptances—Double Insolvency.*] *G.* was in the habit of drawing bills on *Y.* and of sending him bills to put him in funds to meet them. A separate account of these transactions was kept, styled "No. 1 account," and the letters inclosing the remittances directed them to be placed to *G.'s* credit in Account No. 1. Accounts were made out half-yearly. Each remittance was entered under the date when the bill came to hand, but if it became payable before the close of the account, *G.* was credited with interest for the interval between the day of its falling due and the close of the account. If it fell due after the close of the account, he was debited with interest for that period. If a remitted bill was dishonoured, *G.* was debited with the costs, and entries of principal and interest were made on the opposite side of the account so as virtually to strike the bill out of the account. *Y.* stopped payment, and made a statutory composition of 3*s.* 4*d.* in the pound with his creditors, including the holders of his outstanding acceptances for *G.* At the time of the stoppage if he was credited with only 3*s.* 4*d.* in the pound on these acceptances, the balance was in favour of *G.*, without taking into account a number of bills remitted by *G.* and still remaining in specie. *G.*, who was domiciled in *Spain*, shortly afterwards entered into some composition with his creditors, but its nature did not appear. The Registrar decided that the remittances remaining in specie belonged neither to the bill-holders nor to *G.*, but to *Y.* *G.* appealed, but the bill-holders did not:—*Held*, that the remittances were appropriated to No. 1 account, and that, as *Y.* had been fully reimbursed all that he had paid or was liable to pay for *G.* on that account, the remittances remaining in specie belonged to *G.* *Ex parte* Gomez. *In re* Yglesias - - - 639

SECURITY FOR COSTS—*Practice—Limited Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 69.] Where a limited company which was in course of being wound up was Plaintiff, it was ordered to give security for costs for a limited sum until the Defendants applying for security had put in their answers, with liberty to them, when their answers were put in, to renew the motion in order to obtain further security. Western of Canada Oil, Lands, and Works Company *v.* Walker - - - - - 628

SECURITY—Debtor's summons - - 175
See Debtor's Summons. 2.

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See Undue Influence.

SEPARATE CREDITORS—Liquidation—No resolution passed by separate creditors 479
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—— Out of jurisdiction—Trustee Relief Act 275
See Trustee Relief Act.

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—— Person of unsound mind—Settled Estates Act
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—— Petition for reinvestment—Mortgagees 328
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See Mutual Credits.

SETTING ASIDE SECURITY — Confirmation — Laches - - - - 15
See Undue Influence.

SETTLED ESTATES ACT—*Person of Unsound Mind not so found—Service under Settled Estates Amendment Act* (37 & 38 *Vict. c.* 33), *s.* 2.] A person of unsound mind, not so found by inquisition, whose consent is required to a petition under the *Settled Estates Act*, may be served with a notice under the 2nd section of the *Settled Estates Amendment Act*, 1874. Such notice should be served on the person of unsound mind personally, and also on the person in whose care he is. *In re* Crabtree's Settled Estates - - 201

SETTLEMENT — Lunatic — Proceedings to impeach - - - - 192
See Settlement by Lunatic.

—— Vesting—Death in lifetime of parents 555
See Death coupled with a Contingency.

SETTLEMENT BY LUNATIC—*Lunacy—Proceedings to impeach.*] A gentleman made a settlement of nearly the whole of his property in trust for himself for life, and then for four of his five children and their issue. About two years afterwards he was found lunatic. A son who took no benefit under the settlement desired to have it impeached, and adduced evidence shewing that there was reasonable ground for contending that the settlor was of unsound mind when he executed it. The income of the lunatic was amply sufficient for his wants:—*Held*, that no proceedings ought to be directed at the expense of the lunatic's estate, but that the excluded son ought to be allowed to file a bill, as next friend of the lunatic, without giving security for costs, to impeach the settlement. *In re* Gordon (a Lunatic) [192

SHARES—Bequest of—Railway stock - 148
See Bequest of Shares.
—— Paid-up—Contract for - 157, 614
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SHAREHOLDERS — Meeting — Jurisdiction of Court to order meeting to be held 606
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See Execution Creditor. 1.
SOLICITOR—Lien on documents—Charge of solicitor - - - - - 340
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—— Lien on fund - - - - 291
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SOLICITOR'S LIEN—*Costs*—23 & 24 *Vict. c.* 127, *s.* 28—*Taxation.*] *B.* acted as attorney for *G.* in an action which resulted in *G.'s* recovering a large sum. A bill was filed by persons claiming through *G.* to establish their equitable title to that sum, and in February, 1871, the Defendant in the action paid the sum recovered into Court to the credit of the cause in which *B.* was a Defendant in respect of his lien. In March, 1871, *B.* delivered his bill of costs in the action to *G.* In December, 1873, the suit was compromised and the fund distributed, except a sum kept in Court to answer *B.'s* claims:—*Held* (reversing the decision of *Malins*, V.C.), that *B.* was not entitled to have his bill of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that *G.'s* right to tax it would have been lost before the fund was paid into Court. De Bay *v.* Griffin - 291
SPECIFIC PERFORMANCE—Agreement for compromise - - - 534
See Compromise, how enforced.
—— Apportionment of purchase-money—Distinct properties - - - - 319
See Apportionment.
SPECIFIC PERFORMANCE WITH COMPENSATION—*Calculation—Income — Price — Partial Failure of Case—Costs on further Consideration.*] In suits as to the specific performance of a contract to purchase large colliery works, the purchasers alleged as a defence misrepresentation by the vendors as to the value. As to several allegations the purchasers were held to have failed, and specific performance was decreed, but with compensation to the purchasers in respect of an alleged misrepresentation as to the amount of stores consumed in the collieries, and a consequent excess in the statement of income. An inquiry was directed as to such compensation, and it was found that there was a large excess in the statement of income beyond its true amount:—*Held*, that the purchasers were entitled to a deduction from their purchase-money bearing the same proportion to the whole purchase-money as the excess bore to the income stated:—*Held*, that as no direction as to costs was given by the original decrees in the suits, and that as the purchasers were held to be entitled to a considerable abatement, the vendors must pay the costs of the
SPECIFIC PERFORMANCE WITH COMPENSATION—*continued.*
suits, and could not on the hearing on further consideration be relieved from payment of any part of the costs on account of the failure of the purchasers as to parts of their case on the original hearing.—Order of *Bacon*, V.C., affirmed with a variation. Powell *v.* Elliot - - - 424
SPORTING—Sale of right—Cutting timber 355
See Waste.
STATEMENT OF DEBTS—*Liquidation—Bills of Exchange—Bankruptcy Act*, 1869, *s.* 126.] The acceptor of two bills of exchange, which had not to his knowledge been negotiated, took proceedings for liquidation by composition, and in his list of creditors entered the drawer as his creditor for the amount of the bills, without stating that the debt was due on bills of exchange. The bills had, in fact, been negotiated, and the holder received no notice of the meeting of creditors:—*Held*, that the holder was not bound by the resolutions at the meeting, and was entitled to pursue his remedies irrespectively of them.—The resolution for a composition was confirmed on the 8th of October, 1874; the holder commenced an action on one of the bills of exchange on the 5th of November, and the first instalment of the composition was payable on the 9th of January, 1875:—*Held*, that it was too late after this for the debtor to have time allowed him to remedy the mistake under the *Bankruptcy Act*, 1869, s. 126, clause 8. *Ex parte* Mathewes. *In re* Angel - 304
2. —— *Bankruptcy—Composition—Surplus in Hands of Trustee after Payment of Composition—Rights of Creditor who is not bound by the Composition—Jurisdiction—Bankruptcy Act*, 1869, *ss.* 72, 126—*Bankruptcy Rules*, 1870, *r.* 281.] A creditor whose name and the amount of whose debt are not entered in the statement of a compounding debtor, and who is, therefore, not bound by the composition, may nevertheless take advantage of the composition and prove his debt, and claim a share in the fund in the hands of the trustees.—A resolution having been passed at a meeting of creditors to accept a composition from a debtor, the debtor paid a sum of money to the trustee which was more than sufficient to pay the composition to all the creditors whose names and debts were entered in his statement. Other creditors who were not bound by the composition had previously filed a bill in Chancery against the debtor and certain persons, charging them with a breach of trust. They did not come in and prove this debt in the composition, but simply gave notice to the trustee of their claim. After all the creditors who were bound by the composition had been paid, the debtor applied to the Court to order the trustee to pay back the surplus of the fund to him:—*Held*, that the Court had jurisdiction to entertain the application under the 72nd section of the *Bankruptcy Act*, 1869, and to take the necessary accounts between the trustee and the debtor:—But *held*, that the Plaintiffs in the Chancery suit had a right to take advantage of the composition, although they were not bound by it, and that the Court would not make an order as to the disposal of the surplus until a decree had been made in the Chancery suit. *Ex parte* Carew. *In re* Carew - - 308

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2 & 3 Anne, c. 4—*Yorkshire Registry* - 8
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2 & 3 Will. 4, c 71—*Prescription* - 283
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3 & 4 Will. 4, c. 104—*Real Assets* - 567
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—— —— s. 73 - - - 56, 328
See Costs under Lands Clauses Act. 1, 2.

10 & 11 Vict. c. 17, s. 18—*Waterworks Clauses*
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—— —— s. 6 - - - - 459
See Compensation under Lands Clauses Act. 3.

10 & 11 Vict. c. 96—*Trustee Relief* - 275
See Trustee Relief Act.

13 & 14 Vict. c. 60, s. 3—*Trustee Act* 55, 272,
See Trustee Acts. 1, 2, 3. [273

15 & 16 Vict. c. 80, s. 33—*Masters Abolition* [236
See Appeal on Adjourned Summons.

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See Parties to Administration Suit.

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See Registration of Bill of Sale.

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See Debtor's Summons. [175, 264, 269

—— —— ss. 12, 16 - - - 417
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—— —— ss. 12, 15, 47, 125 - 479, 490
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—— —— ss. 16, 126 - - - 631
See Meeting of Creditors. 2.

—— —— ss. 23, 24 - - - 512
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—— —— ss. 28, 80 - - - 59
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—— —— ss. 72, 126 - - 304, 308
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See Staying Proceedings in Bankruptcy. 2, 3.

—— —— s. 87 - - - - 168
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—— —— s. 94 - - - - 267
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—— —— s. 125 - - - 255, 479
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—— —— ss. 125, 126 - - - 211
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—— —— s. 126 - - - 88, 108
See Resolution for Composition. 1, 2.

37 & 38 Vict. c. 33, s. 2—*Settled Estates* 201
See Settled Estates Act.

37 & 38 Vict. c. 62, s. 2—*Infants' Relief* 373
See Contract by Infant.

STAYING PROCEEDINGS IN BANKRUPTCY—*Bankruptcy—Adjudication—Composition—Bankruptcy Act*, 1869, *ss.* 28, 125, 126—*Bankruptcy Rules*, 1870, *r.* 266.] *F.* filed a petition for ad-

STAYING PROCEEDINGS IN BANKRUPTCY—*continued.*

judication against *P.*, who shortly afterwards filed a petition for liquidation by arrangement or composition. Before any meeting of creditors had been held, an adjudication was made by consent on *F.'s* petition, with a stay of proceedings under it till a certain day, before which the creditors duly passed resolutions for accepting a composition, which were afterwards duly registered. Orders had been made, by which the proceedings under the adjudication were from time to time stayed until after the registration:—*Held*, that Rule 266 of the *Bankruptcy Rules*, 1870, applies to a case where the petition for adjudication precedes the liquidation petition; that the order for the adjudication must be regarded as made under that rule; and that, resolutions for accepting a composition having been duly registered, the adjudication ought to be annulled. *Ex parte* FOSTER. *In re* POOLEY 59

2. —— *Bankruptcy—Adjudication—Concurrent Proceedings in Liquidation—Rule* 266 *of the Bankruptcy Rules*, 1870—*Discretion of Court—Bankruptcy Act*, 1869, *s.* 80. *sub-s.* 10.] Where a debtor against whom a petition for adjudication of bankruptcy has been presented files a petition for liquidation, the Court has a discretion either to postpone the adjudication till after the meeting of creditors, under the *Bankruptcy Act*, 1869, s. 80, sub-s. 10, or to adjudicate the debtor a bankrupt and suspend the proceedings under the adjudication under Rule 266 of the *Bankruptcy Rules*, 1870, or to adjudicate him a bankrupt simply:—*Semble*, Rule 266 is only intended to apply to cases where the Judge considers that the property would not be sufficiently protected by the proceedings in liquidation. *Ex parte* WALTON. *In re* DANDO - - - 215

3. —— *Bankruptcy—Disputed Debt—Excessive Claim—Costs.*] *C.* issued a debtor's summons against *H.* for £517, alleged to be due on a balance of account. An application to dismiss the summons was refused, and payment not having been made *C.* petitioned for adjudication. The Registrar went into the account, and being of opinion that more than £200 was shewn to be due, adjudicated *H.* bankrupt. On appeal, the Lords Justices, being of opinion that not more than £110 was proved to be due, though *C.* might possibly be able to establish a right to something more, directed that on *H.* paying £110 within fourteen days all proceedings under the adjudication should be stayed without prejudice to any independent proceedings by *C.* for any further sum, and made no order as to costs. *Ex parte* HARRIS. *In re* HARRIS - - . 458

STOP ORDER—*Lunacy—Assignee of one of the Next of Kin.*] The Court will not make an order in the nature of a stop order on the estate of a lunatic in favour of an assignee of the next of kin.—*In re Pigott* (3 Mac. & G. 268) overruled. *In re* WILKINSON - - - - 73

SUBPŒNA DUCES TECUM—Winding-up petition - - - - - 194
See PRODUCTION OF DOCUMENTS. 1.

SUBSCRIPTIONS TO BUILDING SOCIETY—Mortgage - - - - - 41
See BUILDING SOCIETY.

SUBSEQUENT COSTS - - - 334
See COSTS OF INQUIRY.

SUBSTITUTED SERVICE—*Company—Address for Service.*] The liquidators of a company which was being wound up issued a debtor summons against a shareholder for unpaid calls, and obtained an order for substituted service at his registered address in the books of the company. The affidavit on which this order was obtained shewed no grounds for choosing that place except that it was his registered address, and that the articles contained a provision that notices required to be served by the company on shareholders might be served by leaving them at their registered addresses. It clearly appeared that for some years this had not been the shareholder's place of residence or business, and he had a few weeks previously, on an application in the winding-up, made an affidavit in which he gave a different address. Service having been made pursuant to the order, and the debtor having failed to comply with it, the liquidators applied for an adjudication in bankruptcy:—*Held*, that the rule in the articles as to service of notices at the registered address did not give validity to the service of legal proceedings there, and that the question as to the validity of the order for substituted service and of the service under it was open on a petition for adjudication in bankruptcy, and that adjudication had rightly been refused. *Ex parte* CHATTERIS. *In re* STUDER - - 227

SUPERVISION ORDER—Wishes of creditors 618
See WINDING-UP PETITION. 3.

SUPPORT TO BUILDINGS—*Injunction—Minerals—Damages—Grant.*] A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, and reserving all mines and minerals under the piece of land, and power to take the same at pleasure, making compensation for damages to be done to the cotton mill. The grantee covenanted to build and keep in repair the cotton mill:—*Held*, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured.—Decree of the Master of the Rolls affirmed.—*Caledonian Railway Company* v. *Sprot* (2 Macq. 449) distinguished. ASPDEN *v.* SEDDON - - 394

SURETY—Discharge of - - - 211
See DISCHARGE OF SURETY.

SURVIVOR—Death in lifetime of parent - 555
See DEATH COUPLED WITH A CONTINGENCY.

TAXATION OF COSTS—*Practice—Costs—Three Counsel.*] Sir *W. M. James*, L.J., at the sitting of the Court, stated that the Lord Chancellor, in concurrence with the Lords Justices, and after communication with the Taxing Masters, had laid down as a rule that the mere fact of a junior counsel in a cause having been appointed one of Her Majesty's counsel was not a sufficient reason for allowing, on taxation, the costs of briefs to three counsel. MEMORANDUM - - 540

TENANT FOR LIFE — Costs — Lands Clauses Act - - - - - - 56
See COSTS UNDER LANDS CLAUSES ACT. 1.

TENANT IN COMMON—Receipt of rents by one tenant—Breach of trust - - 567
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THAMES CONSERVANCY ACT—20 & 21 Vict. c. cxlvii - - - - 679
See Riparian Owner.

TIDAL RIVER — Riparian owner — Right of access - - - - 679
See Riparian Owner.

TIMBER—Injunction against cutting - 355
See Waste.

TIME—Appeal in winding-up - - 316
See Appeal in Winding-up.

—— Dismissal for want of prosecution—Discretion of judge - - - 206
See Dismissal for want of Prosecution.

—— Motion to set aside award - - 92
See Motion to set aside Award.

—— Winding-up petition—Seven clear days—Bank holiday - - - 470
See Winding-up Petition. 2.

TITLE-DEEDS—Delivery up—Foreclosure 22
See Purchase for Value without Notice.

TRADE-MARK — *Costs—Deception—Misrepresentation.*] A bill was filed by the manufacturers of a substance used instead of hops for brewing beer to restrain the Defendants from making and selling a substance intended for the same purpose. As to some of the grounds for relief the Plaintiffs had failed, and as to others they were held to be too late in their application, and the bill was therefore dismissed; but:—*Held*, that, as the substances made by both Plaintiffs and Defendants were intended to be used to deceive the public, no costs would be given to the Defendants. —Decree of *Malins*, V.C., reversed. Estcourt *v.* Estcourt Hop Essence Company - - 276

TRADER—Debtor's summons—Time of trading
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—— Bankruptcy—Execution—Notice to sheriff
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TRANSFER—Stock—Joint names of transferor and child - - - - 431
See Advancement. 2.

—— Winding-up petition—Concurrent petition
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TRUST—Breach of—Attachment—Debtors Act, 1869 - - - 76, 655, 658, 661
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—— Breach of — Lien on trustee's beneficial interest—Tenant in common - 567
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—— Resulting—Purchase in joint names 343
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—— Resulting — Transfer into joint names of transferor and son-in-law - - 431
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—— Sale—Distinct properties - - 319
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TRUSTEE—Appointment under Trustee Act [55, 272, 273
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TRUSTEE—*continued.*

—— Default in payment of money—Possession or control - - - - 76
See Arrest of Debtor. 1.

—— Purchase by—Directors of company - 96
See Fiduciary Relation. 1.

TRUSTEE IN BANKRUPTCY—Disclaimer of contract for sale—Forfeiture of deposit 512
See Deposit on Sale.

TRUSTEE IN LIQUIDATION—Use of name by creditor - - - - 510
See Fraudulent Preference.

—— Joint and separate estates—Separate creditors - - - - - 479
See Discharge in Bankruptcy. 2.

TRUSTEE ACTS—*Creditors' Deed — Bankruptcy Act*, 1861—*Appointment of New Trustee.*] Where one of the trustees of a creditors' deed registered under the *Bankruptcy Act*, 1861, has become of unsound mind, the Lords Justices sitting in Lunacy have jurisdiction under the Trustee Acts to appoint a new trustee. *In re* Donisthorpe (a Person of Unsound Mind). *In re* Thomson's Trust Deed - - - - - 55

2. —— *Appointment of New Trustee—Trustee of Unsound Mind—Service.*] Where a petition is presented for the appointment of a new trustee under the *Trustee Act*, 1850, in place of a trustee of unsound mind not so found, service on the trustee of unsound mind is not necessary. *In re* Green (a Person of Unsound Mind). *In re* Murton's Trusts - - - - 272

3. —— *Appointment of New Trustees—Lunatic Devisee of a Trustee.*] A testator devised real estate to trustees, their heirs and assigns, upon certain trusts. The surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A petition was presented for the appointment of new trustees, and for the appointment of a person to convey on behalf of the devisees of the surviving trustee:—*Held*, that the petition was properly presented in Lunacy as well as in Chancery. *In re* Mason (a Person of Unsound Mind) - - - 273

TRUSTEE RELIEF ACT — *Practice—Service on Respondent out of the Jurisdiction.*] The Court has jurisdiction to order service of a petition under the *Trustee Relief Act* (10 & 11 Vict. c. 96) on a party out of the jurisdiction. *In re* Haney's Trusts - - - - - 275

UNCONSCIONABLE BARGAIN - - 389
See Usurious Contract.

UNDERTAKING—As to damages—Receiver in bankruptcy - - - - 223
See Injunction in Bankruptcy. 1.

—— Not to repeat trespass - - - 450
See Accommodation Works.

UNDUE INFLUENCE—*Lady just of Age—Subsequent Confirmation — Setting aside Security — Laches.*] A young lady, who was living with her mother and step-father in 1859, shortly after she came of age, at the solicitation of her step-father, executed a bond as surety to secure the repayment of a sum of money advanced by the Defendant payable at the end of six years. In 1866 the

UNDUE INFLUENCE—*continued.*
Defendant brought an action and recovered judgment against the Plaintiff's step-father on the bond, and, to avoid an execution the Plaintiff, who was then twenty-nine years of age, but who still resided principally with her step-father, was induced by him to execute a second bond as surety to secure the amount of the judgment and costs. Both bonds were prepared by the step-father's solicitor, and the Plaintiff had no independent advice. In 1872 the Defendant brought an action against the Plaintiff on the bonds, and she then filed her bill to set them aside:—*Held* (affirming the decision of *Bacon*, V.C.), that the second bond must be taken as connected with the first, and that, as there was no proof that the Plaintiff was aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first; and both bonds were set aside against her:—*Held*, also, that she was not barred by laches, notwithstanding the time which had elapsed before she asserted her right to relief. KEMPSON *v.* ASHBEE - - - - 15

UNPAID VENDOR—Sale of goods—Lien - 491
See VENDOR'S LIEN ON GOODS.

UNSOUND MIND—Person of—Appointment of new trustee - - - 55, 272, 273
See TRUSTEE ACTS. 1, 2, 3.

—— Person of—Service on—Settled Estates Act
See SETTLED ESTATES ACT. [201

USER—Private—Road—Bridge - - 450
See ACCOMMODATION WORKS.

—— Reasonable—Easement - - 582
See ALTERATION OF EASEMENT. 1.

USUAL CLAUSES—Mining lease - - 622
See AGREEMENT FOR LEASE.

USURIOUS CONTRACT — *Mortgage—Reversion—Expectant Heir—Reasonable Bargain.*] A man twenty-six years of age, entitled to a reversion of £600, but wholly without present means, applied to a money lender, who advanced him £85 on a mortgage of the reversion for £100, with a provision that if default should be made in payment of the £100, the £100 should bear interest at 5 per cent. per month. Twelve years afterwards the reversion fell into possession, and on a bill filed by the personal representative of the mortgagor, a decree was made for redemption on payment of the sum borrowed and simple interest at 5 per cent.—Decree of the Master of the Rolls affirmed. BEYNON *v.* COOK - - - 389

VACATION BUSINESS—*Payment out of Deposit.*] An Act authorizing the execution of part of the undertaking proposed by a railway bill, the rest being abandoned, provided for the return to the promoters of a part of the deposit. The Act passed so lately that no application could be made to the Court before the Long Vacation:—*Held* (reversing the decision of *Bacon*, V.C.), that the obtaining payment of this sum out of Court was vacation business. *In re* WIGAN JUNCTION RAILWAYS ACT, 1875 - - - - 541

VENDOR AND PURCHASER—Apportionment of purchase-money — Properties held on distinct trusts - - - 319
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VENDOR'S LIEN—Shipbuilding contract—Bills of exchange - - - 405
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VENDOR'S LIEN ON GOODS—*Payment by Acceptances—Wharfinger's Certificate—Document of Title—Custom of Trade—Payment into Court—Keeping Fund in medio.*] *B. & Co.* sold some iron rails to the *A. Company* by a written contract stipulating that payment should be made by buyers' acceptances of sellers' drafts against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment. As the wharfinger's certificates were delivered the *A. Company* accepted the drafts of *B. & Co.*, according to the contract, which *B. & Co.* negotiated; but the rails remained in *B. & Co.'s* possession. The Plaintiff advanced money to the *A. Company* on the security of some of the wharfinger's certificates which were handed over to him with a written memorandum. The *A. Company* became insolvent, and their acceptances were consequently not paid. The Plaintiff filed a bill against *B. & Co.* and the receiver of the estate of the *A. Company*, claiming a lien on the rails in the hands of *B. & Co.* in priority to their lien as vendors. The bill alleged that according to the custom of the iron trade, the wharfinger's certificates were in fact "warrants." The Plaintiff having moved for an injunction to restrain *B. & Co.* from parting with the rails, or with the money which they might receive in respect of them, the Vice-Chancellor ordered *B. & Co.* to pay the value of the rails into Court, to be kept *in medio* till the decision of the case:—*Held*, first, that the giving of the acceptances in pursuance of the contract was not an absolute payment, but conditional on the acceptances being met; that upon the insolvency of the acceptors the vendor's lien on the goods revived; and that the fact of the vendors having negotiated the bills made no difference.—Secondly, that the wharfinger's certificates were not documents of title, and their delivery passed no right to the goods; and that no custom of trade could give them the effect of "warrants" or documents of title as against the vendors.—An order to bring a fund into Court to remain *in medio* ought not to be made upon a mere allegation in the bill that there is a question to be tried at the hearing.—Decision of *Bacon*, V.C., reversed. GUNN *v.* BOLCKOW, VAUGHAN, & CO. - 491

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WASTE—*Shooting—Cutting Timber—Injunction.*] A landowner, who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting. Order of *Hall*, V.C., reversed. GEARNS *v.* BAKER 355

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WINDING-UP PETITION—*Allegations.*] A winding-up order will be refused if a sufficient case for winding up is not stated on the petition, though such a case be proved in evidence. *In re* WEAR ENGINE WORKS COMPANY - - - 188

2. —— *Company—Practice—Statement of Interest of Petitioner—Advertisement—Mistake in Name of Company—Rule as to Seven Clear Days—Discretion of Judge—General Order of Nov.* 1862, *rr.* 2, 53.] A winding-up petition by a shareholder of a company contained no allegation that the Petitioner had held his shares for six months before filing the petition:—*Held* (affirming the decision of *Bacon*, V.C.), that the omission of this statement did not make the petition demurrable.—The registered name of the company must be accurately stated in the advertisement of a winding-up petition, otherwise the advertisement is invalid.—The advertisements of a winding-up petition were inserted only six clear days before the hearing, the day for hearing petitions having been changed in consequence of the regular day being the Queen's birthday; but several of the contributories and creditors appeared at the hearing. The Vice-Chancellor dispensed with the necessity of publishing fresh advertisements, and made an order for winding up the company:—*Held*, by the Lords Justices, that the Vice-Chancellor had properly exercised his discretion in dispensing with the advertisements, but the order for winding up was discharged under the circumstances, to enable the shareholders to meet and decide whether the company should be wound up voluntarily. *In re* CITY AND COUNTY BANK 470

3. —— *Company—Winding-up—Supervision Order or Winding-up Order—Wishes of Creditors—Companies Act*, 1862, *ss.* 91, 149.] After a petition by a creditor for winding up a company had been presented the company duly passed a resolution for voluntarily winding up. At the hearing a majority in number and value of the creditors appeared, and asked to have the voluntary winding-up continued under supervision, and no creditor except the Petitioner asked for a winding-up order. Vice-Chancellor *Bacon*, however, made an order for compulsory winding-up. From this order a number of the creditors, being a majority of the unsecured creditors, appealed; other creditors supported the same view, and no one but the Petitioner asked for a compulsory winding-up:—*Held*, that it sufficiently appeared without calling a meeting of creditors, that the majority of the creditors desired the voluntary winding-up to be continued under supervision, and that, as it was not shewn that this would do any injustice to the petitioning creditor, a supervision order ought to be made, a creditor not being entitled *ex debito justitiæ* to a winding-up order as between himself and other creditors, though he is so entitled as between himself and the company. *In re* WEST HARTLEPOOL IRONWORKS COMPANY 618

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YORKSHIRE REGISTRY ACT—*Register County—Equitable Incumbrance—2 & 3 Anne, c. 4—Notice—Priority.*] *Held* (affirming the decision of *Bacon*, V.C.), that a further charge in favour of the first mortgagee of land in the *West Riding of Yorkshire* requires registration, and in the absence of registration will be postponed to a subsequent registered mortgage taken without notice of the further charge; and that notice of the first mortgage does not impose on the subsequent incumbrancer the duty of making inquiry of the first mortgagee, and so affect him with notice of the further charge. CREDLAND *v.* POTTER - 8

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET
AND CHARING CROSS.

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